

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

WSOU INVESTMENTS LLC \* March 25, 2021  
\*  
VS. \* CIVIL ACTION NOS.  
\*  
GOOGLE LLC \* W-20-CV-571 thru 585

BEFORE THE HONORABLE ALAN D ALBRIGHT  
TELEPHONIC SCHEDULING CONFERENCE

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09:01 1 (March 25, 2021, 9:01 a.m.)

09:01 2 DEPUTY CLERK: Markman Hearing in Civil Actions

09:02 3 W-20-CV-584, 585, 571, 572, 573, 574, 575, 576, 577, 578, 579,  
09:02 4 580, 581, 582, 583 and 584, all styled WSOU Investments LLC  
09:02 5 versus Google LLC.

09:02 6 MR. SIEGMUND: Good morning, Your Honor. This is Mark  
09:02 7 Siegmund for plaintiff WSOU Investments LLC.

09:02 8 Also with me this morning is James, also known as "Jim"  
09:02 9 Etheridge. We have Ryan Loveless. And our three main speakers  
09:03 10 today addressing the claim terms are going to be Mr. Brett  
09:03 11 Mangrum, Jeff Huang and Brian Koide.

09:03 12 MR. JONES: Your Honor, on behalf of defendant Google,  
09:03 13 this is Mike Jones. Our speakers will be Greg Lanier, Joe  
09:03 14 Sauer, Michael Lavine, Sanjiv Laud, Marlee Hartenstein, Matt  
09:03 15 Warren and Jen Kash.

09:03 16 And also on the line for Google itself, corporate  
09:03 17 representatives are John Colgan, Joe Shear and Timur Engin.

09:03 18 And Mr. Lanier can tell you, if the Court desires, the  
09:03 19 speakers that will speak as to the terms in the order that the  
09:03 20 Court has provided to us.

09:03 21 Thank you, Your Honor.

09:03 22 THE COURT: Thank you, Mr. Jones. Thank you to the  
09:03 23 clients who have taken the time to attend.

09:03 24 Let me apologize to those who are in California, if any  
09:03 25 are. We try to schedule these things so they're not so early,

09:03 1 but with the number of claim terms we have this morning, we  
09:04 2 felt like we might need all day and we needed to get started by  
09:04 3 9:00 to get done.

09:04 4 I'm told we have only 12 claim terms, which is still a  
09:04 5 lot, so that's why we started at the time we did.

09:04 6 We will start with -- give me one second. The first claim  
09:04 7 term I believe that we're going to take up is "continuous-wave  
09:04 8 Doppler radar."

09:04 9 Let me hear from counsel for defendant with respect to  
09:04 10 anything they'd like to say on this claim term and its  
09:04 11 construction.

09:04 12 MR. LANIER: Thank you, Your Honor. This is Greg Lanier  
09:04 13 of Jones Day. I am in California, but the sun is up, so we'll  
09:04 14 survive just fine. We do appreciate Your Honor accommodating  
09:04 15 our request to do this by Zoom.

09:04 16 My partner Joe Sauer will handle this term.

09:04 17 THE COURT: I worry that you are subliminally trying to  
09:04 18 get me to your side by having a guitar hanging in the  
09:05 19 background of your room. I have some of those myself in  
09:05 20 another room. But I just wanted you to know it's not going to  
09:05 21 work. Even if you have a guitar up there, I'm still going to  
09:05 22 be fair and impartial to everyone. So...

09:05 23 (Laughter.)

09:05 24 MR. LANIER: I will not tilt this toward the other wall of  
09:05 25 guitars, so I will not try to take unfair advantage, Your

09:05 1 Honor.

09:05 2 THE COURT: Okay.

09:05 3 MR. LANIER: Mr. Sauer?

09:05 4 MR. SAUER: Thank you. Good morning, Your Honor. Joe  
09:05 5 Sauer for Google.

09:05 6 Jason, if we could put the slides up and start with Slide  
09:05 7 2, that would be great.

09:05 8 Your Honor, I'm going to be really brief with this term.  
09:05 9 And unless Your Honor has -- would like a refresher on the '825  
09:05 10 patent or has any questions on the technology here, I can jump  
09:05 11 right to the claim construction.

09:05 12 THE COURT: No. You can jump. But let me tell you, at  
09:05 13 least on this one, you start off with a little bit of a  
09:05 14 hurdle -- or actually a pretty good hurdle.

09:05 15 One of the things that we do in the office, for better or  
09:05 16 worse, is when I see a claim term like this one that looks to  
09:06 17 me like it's probably pretty well-known in the industry, I'll  
09:06 18 Google it just to see if -- you know, I sit there and say, wow.  
09:06 19 Continuous wave Doppler radar.

09:06 20 My guess is that's something when the inventor was  
09:06 21 drafting this patent that doesn't seem very contentious. And I  
09:06 22 looked it up, and there are about 1,000 hits, as it were, on  
09:06 23 Google with this.

09:06 24 So on these I will tell you unless you can show me some  
09:06 25 reason that there's something in the patent that requires me to

09:06 1 say that it emits an uninterrupted electromagnetic signal,  
09:06 2 you're going to have a tough time with other than plain and  
09:06 3 ordinary meaning.

09:06 4 And let me also start off because I've done this a lot  
09:07 5 lately. Occasionally what happens -- not occasionally. Often  
09:07 6 what happens is what you are about to tell me is that, Judge,  
09:07 7 we know that continuous-wave Doppler radar really does have a  
09:07 8 plain and ordinary meaning, but what we're worried about is we  
09:07 9 have the plaintiff's infringement contentions. And we can tell  
09:07 10 from what they're doing that they're not using the plain and  
09:07 11 ordinary meaning. So you've got to construe it the way we say  
09:07 12 because they're not following plain and ordinary meaning, and  
09:07 13 we want to take care of that now.

09:07 14 And I will tell you, if it saves us time on the other  
09:07 15 claim terms, in my opinion, claim construction on something  
09:07 16 that's plain and ordinary meaning is not the time to be  
09:07 17 prophylactic about what you all are doing.

09:07 18 If down the road -- I'll pick on the plaintiff for a  
09:07 19 second. If down the road the plaintiff submits to Google its  
09:08 20 infringement -- I'm sorry -- its expert report on infringement  
09:08 21 and at that time you can persuade me that when the expert says  
09:08 22 that the product infringes they are not using the plain and  
09:08 23 ordinary meaning, I'll seriously take it up.

09:08 24 I'll point out to everyone that in the recent trial I had  
09:08 25 in Intel, originally that was a three-patent case. And it was

09:08 1 a two-patent case at trial because I granted a motion for  
09:08 2 summary judgment of noninfringement.

09:08 3 In my court I take motions for summary judgment and  
09:08 4 Daubert motions and motions in limine very seriously. And in  
09:08 5 my -- that's where I -- I believe these kind of battles need to  
09:08 6 be waged once I actually know what the plaintiff is going to  
09:08 7 say in their expert report on infringement and you're going to  
09:08 8 say in your reports on invalidity.

09:08 9 So if you have something that you need to add with this  
09:09 10 one -- and I'm sorry for this long lecture, but this is true  
09:09 11 with, you know, a number of these claim terms, as I look down  
09:09 12 at them, "tap direction," "broadcast," the "input image."

09:09 13 These seem to me to be plain and ordinary meaning and not  
09:09 14 needing to be construed in the manner that defendant wants,  
09:09 15 absent some very good arguments we didn't see in the briefing  
09:09 16 as to why the claim terms should be constrained in the manner  
09:09 17 that you all have suggested.

09:09 18 So I know I've put a burden on you, but I feel like  
09:09 19 transparency in what I'm thinking is better for you and your  
09:09 20 clients than have you talk about some stuff that I may or may  
09:09 21 not care about and not get right to the issues that I do.

09:10 22 I think we've had over 100 Markmans now. I figure it's  
09:10 23 best to let you all know exactly what is important to me and  
09:10 24 what is not. So after that long speech, which I apologize for,  
09:10 25 I'm happy to hear any arguments that you want to make.

09:10 1 MR. SAUER: Thank you, Your Honor.

09:10 2 In view of that helpful advice and Your Honor's advice to  
09:10 3 focus on -- today on fine-tuning your preliminary  
09:10 4 constructions, we're going to go ahead and jump right to  
09:10 5 Slide 10.

09:10 6 THE COURT: Okay.

09:10 7 MR. SAUER: And we're not going to continue to argue our  
09:10 8 original construction in view of Your Honor's advice this  
09:10 9 morning.

09:10 10 THE COURT: And let me -- I'm sorry. Let me interrupt you  
09:10 11 one more time.

09:10 12 And I want to make the record very clear to protect your  
09:10 13 client. I allow you all to maintain the constructions that you  
09:10 14 proffered. I understand that you are objecting to me giving  
09:10 15 plain and ordinary meaning. I encourage you all to try and, as  
09:10 16 you said and I say often, fine-tune.

09:11 17 But I want to make the record clear that your original  
09:11 18 proposed construction is what you believe is correct, and  
09:11 19 you're only -- we're only doing this in light of your efforts  
09:11 20 to try and help me come up with a claim construction.

09:11 21 But I want the record to be clear that as far as I'm  
09:11 22 concerned, your client's rights are protected with respect to  
09:11 23 the claim terms that you all proposed.

09:11 24 So, again, I've interrupted you like four times now. I  
09:11 25 try not to do that, but hopefully it will make the record



09:11 1 better for both sides.

09:11 2 MR. SAUER: That's fine. Thank you, Your Honor.

09:11 3 We do agree with our original construction, but in view of  
09:11 4 your preliminary construction, I want to get right to just a  
09:11 5 small suggestion to clarify the plain and ordinary meaning  
09:11 6 based on aspects that we think that both parties are in  
09:11 7 complete agreement here, Your Honor. And that's a continuous  
09:11 8 wave Doppler radar is not pulsed.

09:12 9 And I've highlighted on the slide for you this morning,  
09:12 10 Your Honor, the plaintiff's claim construction briefing.  
09:12 11 Plaintiffs repeatedly acknowledged in its briefs, Your Honor,  
09:12 12 that the '825 patent discloses two types of Doppler radar,  
09:12 13 continuous and pulsed, but that the claims only recite  
09:12 14 continuous wave.

09:12 15 And we're in full agreement with this, Your Honor.

09:12 16 So similar to what Your Honor did recently in the Markman  
09:12 17 orders in the Microsoft cases, we just suggest a minor  
09:12 18 modification to the tentative construction just for clarity,  
09:12 19 making the construction plain and ordinary meaning, wherein the  
09:12 20 plain and ordinary meaning is not pulsed.

09:12 21 And with that said, Your Honor, that's all we have to say  
09:12 22 on this claim this morning.

09:12 23 THE COURT: Mr. Mangrum, I'll pick on you, but I know it  
09:12 24 might be you or Mr. Huang or possibly someone else, but I'll  
09:12 25 start with you.

09:12 1 MR. MANGRUM: Good morning, Your Honor. This is Brett  
09:12 2 Mangrum.

09:12 3 I believe for this term one of my colleagues will be  
09:13 4 addressing this particular term.

09:13 5 MR. KOIDE: Your Honor, this is Mr. Koide. I'll be  
09:13 6 addressing this term.

09:13 7 THE COURT: Good morning. Welcome back.

09:13 8 MR. KOIDE: Good morning, Your Honor. Thank you.

09:13 9 THE COURT: I think it's been almost two days since we've  
09:13 10 been together.

09:13 11 MR. KOIDE: Exactly. Right, Your Honor. I feel like it's  
09:13 12 Ground Hog Day a little bit. I'm sure you do as well.

09:13 13 So we don't want to belabor this point. We largely agree  
09:13 14 with what Your Honor was saying in -- I think Your Honor stole  
09:13 15 the thunder of most of our points in that this is a  
09:13 16 well-recognized term of art.

09:13 17 We cited to both a Wikipedia article and also a training  
09:13 18 manual that shows that continuous-wave Doppler radar is a  
09:13 19 recognized category. And we're entitled to that full scope of  
09:13 20 that category.

09:13 21 The concern we have that has been addressed in our briefs,  
09:13 22 and I don't want to regurgitate it here, but it seems that  
09:13 23 Google is trying to carve out a well-recognized subcategory of  
09:14 24 continuous-wave Doppler radar called a frequency modulated one  
09:14 25 where the frequency is varied. And they seem to be kind of

09:14 1 getting a back end to it.

09:14 2 So I don't exactly know where they're going. But the  
09:14 3 point -- we just largely agree with Your Honor. It's a  
09:14 4 well-recognized term. A POSITA would recognize what it is.  
09:14 5 There's no reason to then kind of clarify and say something  
09:14 6 it's not when it's a well-recognized term. A POSITA would  
09:14 7 understand what this means, and we should get the full scope of  
09:14 8 that.

09:14 9 And that's basically our argument, Your Honor.

09:14 10 THE COURT: Any response from defense?

09:14 11 MR. SAUER: Just quickly, Your Honor. Not to take too  
09:14 12 much time on this term this morning.

09:14 13 THE COURT: Let me -- this is as far as I go if I will,  
09:14 14 say, chastise someone. I'm pretty certain for everyone -- I'm  
09:14 15 pretty certain I've lost more time in my life on the bench by  
09:14 16 people saying "very quickly, Your Honor. I won't take much of  
09:14 17 your time."

09:14 18 (Laughter.)

09:14 19 THE COURT: I think somewhere if I were on ESPN I could  
09:15 20 actually give you a statistic of how much time I've lost.

09:15 21 You all have done -- I enjoy these hearings very much. I  
09:15 22 don't put time limits on them. We have a whole day for this,  
09:15 23 and I don't think we'll have to take it because of the claim  
09:15 24 terms. You all have as much time as you'd like to take to  
09:15 25 argue these things.

09:15 1 And I enjoy these hearings very much. So...

09:15 2 MR. SAUER: Well, thank you, Your Honor. And I will try  
09:15 3 to be really short here because at bottom we are okay with  
09:15 4 plain and ordinary meaning.

09:15 5 We do believe, though, that the plain and ordinary meaning  
09:15 6 differentiates continuous wave from pulse. The patent's clear  
09:15 7 about that. The prosecution history's very clear about that.  
09:15 8 That was the distinction that was made during prosecution to  
09:15 9 overcome the prior art.

09:15 10 We're not trying to play games here, Your Honor. We'd  
09:15 11 just like to clarify this now because we anticipate that it  
09:15 12 could become a dispute down the road. But if at the end of the  
09:15 13 day Your Honor decides on plain and ordinary meaning, we can  
09:15 14 live with that.

09:16 15 THE COURT: Well, here's what I'm going to do on this one,  
09:16 16 this specific claim term. I understand the argument you all  
09:16 17 are having.

09:16 18 I'm going to maintain plain and ordinary meaning, but  
09:16 19 you -- both sides will have a couple of off-ramps. If when you  
09:16 20 get the expert report from the plaintiff, if you believe that  
09:16 21 the plaintiff's expert has taken a position that includes, for  
09:16 22 lack of a better word, "pulse," and you think -- to -- if you  
09:16 23 believe that -- whether he says pulse or not, but he says your  
09:16 24 product infringes, and by doing that he is saying that it  
09:16 25 includes pulse that -- which you believe it should not, you can

09:16 1 come to the Court and ask for a mini-Markman hearing so I can  
09:16 2 clarify and tell you all whether or not I'm okay with that.

09:16 3 Or you can file a motion for summary judgment and say that  
09:16 4 that is not the plain and ordinary meaning.

09:16 5 And I know -- I know that plaintiff's counsel has heard me  
09:17 6 give this lecture because they're kind of frequent flyers in  
09:17 7 some ways and they get to -- they appear in front of me a lot.  
09:17 8 But I just say the parties should not be too greedy in what  
09:17 9 they do on the infringement side or invalidity side with their  
09:17 10 expert reports because if we get -- if you get to that point  
09:17 11 where it's a motion for summary judgment, you're not going to  
09:17 12 have -- be able to fix your report.

09:17 13 So I'm -- plaintiff's counsel has heard your position this  
09:17 14 morning. They know that I'm aware of what your position is.  
09:17 15 When they do their infringement analysis, they'll decide what's  
09:17 16 best for their clients and do whatever they think is the  
09:17 17 appropriate thing to do, and I will take it up. And we will --  
09:17 18 we will take it up if you raise it and you think there's  
09:17 19 something inappropriate -- inappropriate's the wrong word, but  
09:17 20 incorrect, we will take it up before trial.

09:17 21 MR. SAUER: That's more than fair, Your Honor. Thank you.

09:17 22 THE COURT: The next claim term is -- and so folks know  
09:18 23 who have not been on this call before, especially the clients,  
09:18 24 because of Zoom, I wind up having three or four different  
09:18 25 devices going at one time.

09:18 1 So if I look like I'm not paying attention to you all when  
09:18 2 you're speaking, I'm going to one of my devices to figure out  
09:18 3 what's -- what I'm looking at and also communicating with my  
09:18 4 clerks. So I am paying attention.

09:18 5 The next claim term is "tap direction." And again the  
09:18 6 Court has provided plain and ordinary meaning. I'm not sure if  
09:18 7 you're going to continue to argue. But if you are, I welcome  
09:18 8 to hear what you want to say.

09:18 9 MR. LANIER: Your Honor, it's Greg Lanier again. Jen Kash  
09:18 10 of the Warren Lex firm will address this point.

09:18 11 Before Ms. Kash starts, just one quick point.

09:18 12 We really do appreciate Your Honor's clear direction and  
09:18 13 transparency. It will inform the rest of the argument on a  
09:18 14 couple of these terms and in general, but I just wanted to  
09:18 15 express our collective appreciation for that, so...

09:19 16 Ms. Kash?

09:19 17 THE COURT: Well, maybe you should call some of the law  
09:19 18 professors who are complaining about my lack of transparency  
09:19 19 and tell them that your Yelp review is much, much better than  
09:19 20 what I'm doing than theirs is.

09:19 21 At any rate, that was a joke. If any of the law  
09:19 22 professors are listening, that was just a joke.

09:19 23 Ms. Kash?

09:19 24 MS. KASH: Good morning, Your Honor. Good to see you  
09:19 25 again.

09:19 1 THE COURT: Good to see you again.

09:19 2 MS. KASH: You've already taken what was going to be a  
09:19 3 very short argument to even shorter by your words.

09:19 4 One thing that is of concern to us is, unlike waiting for  
09:19 5 a dispute on tap direction until the infringement contention --  
09:19 6 infringement stage, we actually have the dispute somewhat in  
09:19 7 the briefs that were submitted by the plaintiff in terms of the  
09:19 8 ordinary meaning.

09:19 9 We agree with you that if you Google "tap," it means  
09:19 10 something very specific. And so what we're trying to get an  
09:19 11 understanding of is if the plain and ordinary meaning here is  
09:19 12 that tap means tap.

09:19 13 And in the plaintiff's reply brief, they specifically  
09:20 14 state that they think that our read of the tap being a lift-up  
09:20 15 in some location and, therefore, limiting tap direction to  
09:20 16 being the direction between taps in our construction that we  
09:20 17 sought, they say that's an error.

09:20 18 And so we think this entire issue can and should be fairly  
09:20 19 straightforward if tap is to mean tap, but we didn't -- we need  
09:20 20 some guidance from the Court if that's its understanding as  
09:20 21 well.

09:20 22 THE COURT: I'm not sure who's going to speak on behalf of  
09:20 23 plaintiff.

09:20 24 MR. KOIDE: Your Honor, this is Mr. Koide again. I'm  
09:20 25 speaking for this term as well.

09:20 1 THE COURT: Yes, sir.

09:20 2 MR. KOIDE: Okay. Again, I don't want to -- our main  
09:20 3 point here is that it's a term that should be given its plain  
09:20 4 and ordinary meaning to a POSITA, and so we agree with Your  
09:20 5 Honor.

09:20 6 And I don't want to regurgitate the phrase, but the main  
09:20 7 difference in the view of the specification's discussion of tap  
09:20 8 is that Google views this discussion where it talks about  
09:20 9 pointing, tapping and dragging all as mutually exclusive.

09:21 10 As we explained in our brief, they overlap. For instance,  
09:21 11 you could, you know, tap on a screen and then drag, or point on  
09:21 12 a screen and then drag. So they weren't meant to be these  
09:21 13 three mutually exclusive categories.

09:21 14 And just, you know, even though the plain lay meaning of  
09:21 15 tap is not necessarily the controlling, just to show it as an  
09:21 16 analogy. This could be a tap, okay? This is what Google's  
09:21 17 saying, a tap, lift, tap, lift. It's also if I tap someone on  
09:21 18 the shoulder and go like this and keep it there, that's a tap  
09:21 19 too.

09:21 20 So that's the main difference we have is that they're  
09:21 21 trying to unduly limit it to a particular preferred embodiment,  
09:21 22 and we think we're entitled to the broader context of tap  
09:21 23 direction.

09:21 24 THE COURT: Well, let me suggest this on this one. Again,  
09:21 25 I understand this is important stuff.



09:21 1 Why don't we do this? I don't know exactly when, but  
09:21 2 there will be a time in the very near future when the plaintiff  
09:22 3 will have to provide its infringement contentions that's --  
09:22 4 it's set out in the schedule, but I'm not sure exactly when it  
09:22 5 is.

09:22 6 If when the -- if when the plaintiff gives the defendant  
09:22 7 its infringement contentions, if the defendant believes I need  
09:22 8 to review and make sure that the position being taken by the  
09:22 9 plaintiff on tap is consistent with plain and ordinary meaning,  
09:22 10 I'll be happy to do that.

09:22 11 I will say, though, at this point that from what I read,  
09:22 12 I'm in the -- for lack of a better word, I think tap is  
09:22 13 something that ought to be given its full meaning, and I think  
09:22 14 the plaintiff's position is perfectly reasonable in terms of it  
09:22 15 being within the plain and ordinary meaning.

09:22 16 But we'll know more when you get the infringement  
09:23 17 contentions, and you can contact the Court, and we can do a  
09:23 18 quick hearing in that regard.

09:23 19 But I think tap direction, as far as I'm concerned, I  
09:23 20 think you will -- I think Google should anticipate that it'll  
09:23 21 be a fairly broad construction in plain and ordinary meaning of  
09:23 22 what tap means.

09:23 23 And so let's move to the next claim term, which is  
09:23 24 "communication traffic" and goes on. Again, the Court has  
09:23 25 given plain and ordinary meaning.

09:23 1 Who will be speaking on behalf of the defendant?

09:23 2 Ms. Kash, I'll start with you, or Mr. Lanier or whoever.

09:23 3 MR. LANIER: Thank you, Your Honor. My colleague, Michael  
09:23 4 Lavine, and Tracy Stitt, my other colleague, may also be  
09:23 5 lurking about that. But Mr. Lavine will take point on this  
09:23 6 issue. Thank you.

09:23 7 THE COURT: Okay.

09:23 8 MR. LAVINE: Good morning, Your Honor. Mike Lavine for  
09:23 9 Google.

09:23 10 THE COURT: Mr. Lavine, I don't think I've had you in  
09:23 11 front of me before, at least not by -- in an appearance.  
09:24 12 Welcome to my Court. I appreciate you attending.

09:24 13 MR. LAVINE: Thank you. Glad to be here.

09:24 14 If you could bring up the slides.

09:24 15 All right. Let's switch to Slide 4.

09:24 16 So, Your Honor, in view of the Court's preliminary  
09:24 17 construction and to narrow the issues related to the term,  
09:24 18 Google is proposing that an alternative construction that  
09:24 19 focuses only on the access communication link portion of this  
09:24 20 term. So as you can see here --

09:24 21 THE COURT: Can you give me just one -- let me read it  
09:24 22 real quick, and then I'll -- I can't read and listen at the  
09:24 23 same time. Let me read what you've done real quick, and then  
09:24 24 I'll get you started in just one second.

09:25 25 MR. LAVINE: Sure.

09:25 1 THE COURT: Mr. Lavine, thank you very much.

09:25 2 MR. LAVINE: All right. Let's turn to Slide 5.

09:25 3 So here I want -- I'd like to explain to the Court why  
09:25 4 Google's construction should be adopted.

09:25 5 So the core of the dispute here is must the access  
09:25 6 communication link connect to the communication network  
09:25 7 subscriber?

09:25 8 Now, the plaintiff is saying no. They're arguing that  
09:25 9 it's not necessarily connected to a subscriber, but this is  
09:25 10 inconsistent with what the claims and the specification  
09:25 11 actually say.

09:25 12 There are really two fundamental aspects of this  
09:25 13 invention, which are repeatedly stated by the patent. The  
09:26 14 first one is to monitor all of the communication networks  
09:26 15 subscriber traffic over the access communication link and to  
09:26 16 provide electronic content to the subscriber over that same  
09:26 17 link through the access network.

09:26 18 However, you can't -- all the traffic can't be monitored  
09:26 19 and the electronic content cannot be provided to the subscriber  
09:26 20 unless that access communication link is in -- at a point in  
09:26 21 the network where it can connect the subscriber to the actual  
09:26 22 network.

09:26 23 And this point is set forth in the claim language itself,  
09:26 24 which you see here on the right. The communication traffic  
09:26 25 exchanged with the subscriber is monitored as it travels across

09:26 1 the access communication link. That same link enables the  
09:26 2 subscriber to access the electronic content. That link is in  
09:26 3 an access network which contains the content source that  
09:26 4 delivers content to the subscriber over that link.

09:26 5 And if you turn to Slide 6, we can see more of the key  
09:27 6 evidence in the specification that underscores Google's  
09:27 7 position.

09:27 8 Looking at Figure 2 at the top part of the slide, this is  
09:27 9 a magnification of a portion of Figure 2 from the patent. And  
09:27 10 you see highlighted in blue, there's an Item 26. That is the  
09:27 11 access communication link, and it is the only place that a  
09:27 12 patent identifies as a location for the access communication  
09:27 13 link.

09:27 14 The specification also repeatedly and consistently places  
09:27 15 that link, that access communication link directly between the  
09:27 16 subscriber and the access network.

09:27 17 In particular, if you look at Column -- on the bottom left  
09:27 18 to Column 7, Lines 61 to 67, it reads here that the  
09:27 19 "interactions between the subscriber and the electronic content  
09:27 20 source are enabled by the access communication link through the  
09:27 21 access network."

09:27 22 And further down in that call-out it reads that "all of  
09:27 23 the online traffic that is exchanged with the subscriber  
09:27 24 traverses the access communication link."

09:28 25 So there's no doubt that there's -- there has to be a

09:28 1 connection between the communication network subscriber and the  
09:28 2 access network.

09:28 3 And finally --

09:28 4 THE COURT: Mr. Lavine?

09:28 5 MR. LAVINE: Yes.

09:28 6 THE COURT: If I could have you -- I'm going to let you  
09:28 7 finish and say whatever you want, but if we could flip to  
09:28 8 whoever's going to speak for the plaintiff. And I'll let  
09:28 9 you -- plaintiff do whatever they want once it's your turn, but  
09:28 10 if you could address real quickly while we have this slide up  
09:28 11 what's shown on Column 5 (sic), at Lines 36 to 38, and respond  
09:28 12 to where it says, "In a typical ISP scenario, all of the online  
09:28 13 traffic that is exchanged with the subscriber 22 traverses the  
09:28 14 access communication to link 26."

09:28 15 And then, Mr. Lavine, I'll let you respond back, if I  
09:28 16 could hear from plaintiff.

09:29 17 I'm not sure who just responded for plaintiff, but at  
09:29 18 least I can't hear them.

09:29 19 Mr. Lanier, can you hear me?

09:29 20 MR. LANIER: Yes, Your Honor. I can hear Your Honor and  
09:29 21 Mr. Lavine. I could not hear anyone for plaintiff.

09:29 22 THE COURT: Well, then let's do this. Let's go ahead and  
09:30 23 have Mr. Lavine finish. And maybe we can -- and if y'all can  
09:30 24 remember when you come back to that slide, I'd like to hear on  
09:30 25 that.

09:30 1 But let's let -- Mr. Lavine, if you'd finish, and I'll  
09:30 2 hear from the plaintiff and hopefully we'll get back on audio.

09:30 3 MR. LAVINE: Yes, Your Honor.

09:30 4 Let's turn to Slide 7.

09:30 5 So one of the plaintiff's arguments is that Google's  
09:30 6 construction precludes having the access communication link in  
09:30 7 the access network, but that argument really is not supported  
09:30 8 by the specification.

09:30 9 And here we focus again on Figure 2, which is magnified to  
09:30 10 show that connection between the subscriber and the access  
09:30 11 network. You can see that the access communication link  
09:30 12 clearly is between the subscriber and the access network. But  
09:30 13 it's also part of it that is inside the access network itself.

09:30 14 So the link can exist both between and in the access  
09:30 15 network. But even if the Court takes issue with the word  
09:30 16 "between" for describing the link, we can use the word  
09:30 17 "connected" instead. So the construction of "access  
09:31 18 communication link" becomes a network link connecting the  
09:31 19 communication network subscriber and the access network.

09:31 20 But regardless of whether you use "between" or  
09:31 21 "connecting," the key takeaway is that based on the claims in  
09:31 22 the specification, the access communication link must connect  
09:31 23 the subscriber and the access network.

09:31 24 So that's all we have on this term, Your Honor.

09:31 25 THE COURT: Thank you, Mr. Lavine. Well done.

09:31 1 Is -- for the plaintiff?

09:31 2 MR. MANGRUM: Your Honor, this is Brett Mangrum for the  
09:31 3 plaintiff. If we can put that slide back up, and I apologize  
09:31 4 for not speaking earlier. We had a disconnect on our side with  
09:31 5 respect to who would be addressing.

09:31 6 So keeping in mind that we were just informed that this  
09:31 7 would be one of the terms that they wanted to address, I think  
09:31 8 the -- the salient point from the quotation that Your Honor  
09:31 9 raised is that the phrasing itself in that disclosure says  
09:31 10 "typically." And that's a signal that's used by patent  
09:32 11 practitioners to make clear that what follows is exemplary  
09:32 12 disclosure.

09:32 13 And when you have things such as "typically" or "for  
09:32 14 example" or "in some embodiments" or "in certain embodiments"  
09:32 15 or "in this embodiment," these are ways in which patent  
09:32 16 drafters signal to the reader that what follows is exemplary.  
09:32 17 It pertains to a specific example and is not meant to be read  
09:32 18 in as a claim limitation.

09:32 19 Now, that type of phraseology within patent drafting is  
09:32 20 often juxtaposed by the courts in instances where a patentee  
09:32 21 makes very clear that a certain description that follows is  
09:32 22 intended to be limiting.

09:32 23 And oftentimes that appears in languages such as "must,"  
09:32 24 "the present invention must." And quite often it's simply  
09:33 25 expressed in the claim language itself.

09:33 1 So our concern, and we've seen this throughout the  
09:33 2 briefing Google's offered, is that in many instances you have  
09:33 3 this explanatory language, to an example "embodiment" signaled  
09:33 4 by languages such as "typically" or "for example." And Google  
09:33 5 has then read in that exemplary disclosure as a claim  
09:33 6 limitation.

09:33 7 And in our briefing in every instance that's happened,  
09:33 8 we've attempted to draw Your Honor's attention to the Phillips  
09:33 9 counsel against reading in claim limitations -- sorry --  
09:33 10 importing claim limitations from the specification into a claim  
09:33 11 term as a cardinal sin.

09:33 12 We've also pointed Your Honor to case law that says this  
09:33 13 is improper to do even in those instances -- which is not the  
09:33 14 case here -- where only a single embodiment is disclosed.

09:34 15 So, again, we would submit that in asking us to focus on  
09:34 16 this particular statement, the word "typically" actually  
09:34 17 undercuts Google's position and favors plain and ordinary  
09:34 18 meaning that's not so limiting.

09:34 19 (Clarification by the reporter.)

09:34 20 THE COURT: Mr. Lavine?

09:34 21 MR. LAVINE: Yes, Your Honor. I think the focus on the  
09:34 22 word "typical" really doesn't address the issue here.

09:34 23 Like I said, the main point is -- of this invention, of  
09:34 24 this patent is to monitor all of the subscriber's communication  
09:34 25 traffic.



09:34 1 If you adopt the plaintiff's position, that really  
09:34 2 detaches the subscriber from the rest of the network in a way  
09:34 3 that doesn't make sense. Because without that link between the  
09:34 4 subscriber and the access network, you can't monitor that  
09:35 5 traffic, and you can't provide them the content.

09:35 6 And the whole point of this patent is to use that traffic,  
09:35 7 monitor that traffic and create a profile that is used to  
09:35 8 provide targeted content to the subscriber. That link is  
09:35 9 essential, and it must under all circumstances exist between  
09:35 10 the subscriber and the access network.

09:35 11 THE COURT: Any response?

09:35 12 MR. MANGRUM: Yes, Your Honor. Brett Mangrum for patent  
09:35 13 owner.

09:35 14 Again, the purpose of claim construction is to not provide  
09:35 15 within a -- an interpretation of a specific claim term -- an  
09:35 16 explanation of how the invention is supposed to operate.

09:35 17 Nor is it an opportunity to suggest that in the absence of  
09:35 18 some type of additional instruction or interpretation or  
09:35 19 limitation, the claims would not operate as intended.

09:35 20 Those questions of interoperability go to not claim  
09:35 21 construction but another statutory requirement. And we would  
09:36 22 submit that we've heard nothing today nor in the briefing that  
09:36 23 would compel -- and, again, the standard -- sorry -- would  
09:36 24 compel the limitations they're seeking to require.

09:36 25 And the standard here when you're attempting to read in

09:36 1 "exemplary disclosure" as a claim limitation is that the  
09:36 2 intrinsic evidence must -- and I'm quoting here --  
09:36 3 "unambiguously require" the limitations being sought.

09:36 4 What we just heard is, well, don't pay attention to the  
09:36 5 word "typically" and look at the rest of the disclosure.

09:36 6 But you have to. You have to consider what the patentee  
09:36 7 said because in this instance words matter. And they signal an  
09:36 8 intent to give an explanatory description of something that's  
09:36 9 not limiting but simply a fulsome description of how things  
09:36 10 would operate according to a particular embodiment.

09:36 11 It is very important. The standard's clear. And the  
09:36 12 attempt to import something just to make a claim -- allegedly  
09:37 13 make a claim inoperable under the term -- under an argument  
09:37 14 offered by an attorney and not by an expert, we think doesn't  
09:37 15 meet the exacting standard here to import a limitation.

09:37 16 THE COURT: The Court is going to maintain its preliminary  
09:37 17 construction of plain and ordinary meaning.

09:37 18 Given what I've said earlier and what we've discussed, is  
09:37 19 there any need -- I'll ask counsel for the defendant. Is there  
09:37 20 any need to take up "broadcast" and "broadcasting"?

09:37 21 MR. LANIER: Your Honor, Ms. Stitt will address that  
09:37 22 extremely briefly in view of Your Honor's guidance.

09:37 23 (Laughter.)

09:37 24 THE COURT: Okay.

09:37 25 MR. LANIER: Thank you.

09:37 1 MS. STITT: Good morning, Your Honor. Tracy Stitt  
09:37 2 representing Google. Pleasure to be here, and I will cut  
09:37 3 straight to the point.

09:37 4 So, Jason, if you could please put up Slide 3.

09:38 5 With Your Honor's previous guidance, we understand the  
09:38 6 position. And the sole purpose for raising this term was to  
09:38 7 request a clarification of the plain and ordinary meaning, and  
09:38 8 that is to resolve what we feel is an issue and dispute based  
09:38 9 on a statement in the plaintiff's brief. And that is whether  
09:38 10 "broadcasting" means transmission to all receivers in the  
09:38 11 network.

09:38 12 In their brief plaintiffs indicated that it does not  
09:38 13 necessarily require transmission to all receivers in a network.  
09:38 14 The claim language and the specification as we've cited we  
09:38 15 believe does require that. And so for that reason we request  
09:38 16 the clarification that the plain and ordinary meaning, which is  
09:38 17 "transmission to all receivers in a network."

09:38 18 THE COURT: Well, I know what you would like. I don't  
09:38 19 think this is -- based on their briefing, I really don't think,  
09:38 20 though, until the plaintiff's expert has taken a position with  
09:38 21 respect to what infringement is or is not, that -- I don't  
09:39 22 think this -- I think broadcasting means broadcasting.

09:39 23 And I know that the plaintiff -- you've each done your  
09:39 24 briefing, but I think it's just plain and ordinary meaning.  
09:39 25 And, again, it's something that, you know, we'll take up down

09:39 1 the road if necessary.

09:39 2 And let me add one more thing, though, that I also think  
09:39 3 on a claim term like "broadcasting," I don't think that -- this  
09:39 4 is my opinion. The Circuit may tell me ultimately I'm wrong.  
09:39 5 I don't think that you get to -- and I'm not saying you said  
09:39 6 the words "02 Micro," but I don't think you get to create an  
09:39 7 02 Micro situation by taking a word that's -- like  
09:39 8 "broadcasting" and having a difference of opinion.

09:39 9 It may very well be in this case that if the parties take  
09:39 10 different positions with respect to what the plain and ordinary  
09:39 11 meaning of "broadcasting" is, I may very well decide that  
09:39 12 that's an issue that a jury can take up as well.

09:40 13 But I'm going to maintain plain and ordinary meaning for  
09:40 14 "broadcasting."

09:40 15 Let me see what the next claim term is.

09:40 16 It is "the input image," and, again, it appears that  
09:40 17 Google would like to take this and have me insert the words  
09:40 18 "the original input image."

09:40 19 But I will allow Google's counsel to tell me why it is  
09:40 20 that I should take a claim term like "the input image" and give  
09:40 21 it anything other than its plain and ordinary meaning.

09:40 22 MR. LANIER: Your Honor, Matt Warren of the Warren Lex  
09:40 23 firm will address this term and the other terms in the '491  
09:40 24 patent.

09:40 25 THE COURT: Okay. Mr. Warren, I don't think I've had you

09:40 1 appear in front of me either, at least not by person -- by  
09:40 2 video. I welcome you to my court.

09:41 3 MR. WARREN: Good morning, Your Honor. And thank you.  
09:41 4 This is my first appearance before Your Honor, and I'm honored  
09:41 5 to be here.

09:41 6 Jason, if you could put up the slide.

09:41 7 Your Honor, in light of the Court's tentative, we're not  
09:41 8 going to contest at this time. Obviously, we'll reserve our  
09:41 9 rights.

09:41 10 The original construction -- I do want to ask one  
09:41 11 clarification about the plain and ordinary meaning.

09:41 12 And, Jason, if you could go one slide forward.

09:41 13 Our understanding of the plain and ordinary meaning of an  
09:41 14 input image, whatever else it includes, is that every instance  
09:41 15 of "the input image," using the normal patent rules of  
09:41 16 antecedent basis, refers back to "an input image" at the  
09:41 17 beginning of the claim.

09:41 18 The plaintiff has stated in its claim construction  
09:41 19 briefing that it does not agree.

09:41 20 And, Jason, could you advance one?

09:41 21 And has indicated that two of these indications of "the  
09:41 22 input image" means something other than what we would consider  
09:42 23 to be the clear antecedent basis, "an input image."

09:42 24 And so we would appreciate clarification from the Court as  
09:42 25 to whether the plain and ordinary meaning of "the input image"

09:42 1 allows for that word to mean different things over the course  
09:42 2 of the claim or, as we believe, whether it refers back  
09:42 3 consistently to "an input image," the antecedent basis.

09:42 4 THE COURT: I'll hear a response from the plaintiff.

09:42 5 MR. MANGRUM: Your Honor, this is Brett Mangrum for the  
09:42 6 plaintiff.

09:42 7 My father, who is a law professor who's never commented on  
09:42 8 your court, he once taught when you strike oil, quit drilling.  
09:42 9 And I think that's kind of where we are here.

09:42 10 But out of the sake of completeness, if you look at -- and  
09:42 11 what I'm going to do is actually pull up the claim and then  
09:42 12 share my screen. Do that real quick.

09:43 13 Okay. So what I've done here, I actually pulled this up  
09:43 14 from the Google app, and I've highlighted "the input image."

09:43 15 Just to confirm, Your Honor, are you able to see the full  
09:43 16 Claim 1 clearly so that I can address it? On your screen.

09:43 17 THE COURT: I get down to -- I see all the way down to  
09:43 18 where it says "perform" -- let me see if I can move you folks.

09:43 19 I can now. Yes.

09:43 20 MR. MANGRUM: Okay. Good.

09:43 21 Okay. So our point here was that as you go through  
09:44 22 Claim 1, you see at the outset -- and I'm at the -- sorry. I'm  
09:44 23 at the first clause, the processing clause. The processing is  
09:44 24 defined in terms of a correct -- performing a correction on the  
09:44 25 input image.

09:44 1 Now, that's important because the correction on the input  
09:44 2 image is later referenced as either being successful or  
09:44 3 unsuccessful. So here -- let me give you an example.

09:44 4 In response to the processing of the input image being  
09:44 5 unsuccessful. Now, keep in mind the processing must include a  
09:44 6 correction on the input image.

09:44 7 So in certain clauses there are method steps performed on  
09:44 8 the condition of the processing being unsuccessful. In other  
09:44 9 clauses there's processing being conditioned in response to the  
09:45 10 processing of the input image being successful.

09:45 11 So in the instances where it's successful, necessarily  
09:45 12 there must have been a correction on the input image, right?  
09:45 13 That's obviously not necessary in the case for unsuccessful.

09:45 14 What we heard today from Google's counsel was that -- a  
09:45 15 concern that the input image is not necessarily the same in all  
09:45 16 instances under the process flow set forth in Claim 1.

09:45 17 Well, that should not be a concern because there are  
09:45 18 conditional statements that are mutually exclusive. In one  
09:45 19 instance, something being in response to the input image being  
09:45 20 unsuccessful; in another instance, something being responsive  
09:45 21 to the processing of the input image being successful, which,  
09:45 22 again, would necessarily require performing a correction on the  
09:45 23 input image.

09:45 24 So in asking for the plain and ordinary meaning, we're not  
09:46 25 departing from this antecedent reference of "the" inserted

09:46 1 before "input image." Rather, we are recognizing that the  
09:46 2 claim language itself provides sufficient context.

09:46 3 And to suggest that "the input image" always refers to "an  
09:46 4 input image" that had no correction performed thereon is just  
09:46 5 simply inconsistent with the plain reading of the claim  
09:46 6 language.

09:46 7 And to be clear, Your Honor, I think we've addressed all  
09:46 8 of this in our briefing. I'm just attempting to summarize the  
09:46 9 more salient points in view of what was argued today.

09:46 10 And with that, I'll stop sharing my screen.

09:46 11 THE COURT: Okay. Any response from Google?

09:46 12 MR. WARREN: So I timed that, Your Honor. That was just  
09:46 13 over three and a half minutes to explain the plaintiff's  
09:46 14 meaning of the term.

09:46 15 I don't know what it is, but it's not plain and ordinary.

09:47 16 Our understanding, which is plain and ordinary, is that  
09:47 17 the word "an input image" sets -- you know, references an  
09:47 18 image. That's the plain and ordinary meaning of the words  
09:47 19 "and" and "image."

09:47 20 And, furthermore, using the normal rules of patent  
09:47 21 construction, later references to "the input image" refer back  
09:47 22 to the same image. I don't know how to summarize it more  
09:47 23 quickly than that. I think that's pretty quickly. And I think  
09:47 24 that plaintiff's sort of convoluted explanation of the  
09:47 25 rationale for their understanding of the term explains why that



09:47 1 is not the plain and ordinary meaning.

09:47 2 THE COURT: Anything else from plaintiff?

09:47 3 MR. MANGRUM: No, Your Honor.

09:47 4 We have no ad hominem attack or any other explanation  
09:47 5 other than what we've given or what's in our briefing.

09:47 6 THE COURT: I'll be back in a few seconds.

09:47 7 (Pause in proceedings.)

09:48 8 THE COURT: Okay. The Court does not believe that it  
09:48 9 needs to give any additional construction to this. It will  
09:48 10 maintain plain and ordinary meaning.

09:48 11 The next up we are moving -- let's see. We're moving to  
09:49 12 "said processor configured to provide..." and it goes on. And  
09:49 13 these are ones that my understanding is the plaintiff has asked  
09:49 14 the Court to hear.

09:49 15 And so I'll start with plaintiff's counsel, whoever's  
09:49 16 going to speak on behalf of plaintiff.

09:49 17 MR. MANGRUM: Your Honor, this is Brett --

09:49 18 THE COURT: Hannah tells me -- just told me I skipped  
09:49 19 some, and I may have, given -- whoops. Did I skip -- I skipped  
09:49 20 "computer program product." I apologize.

09:49 21 Let me do "computer program product," and then we have one  
09:49 22 more for defendant, and then I'll turn to plaintiff. So I  
09:49 23 apologize for that.

09:49 24 MR. WARREN: Thank you, Your Honor. And no problem.

09:49 25 The -- there are two terms left, Claim 25 of the '491

09:49 1 patent and Claim 13 of the '491 patent. For these terms, there  
09:49 2 are two issues: One, whether or not means-plus-function  
09:50 3 treatment applies and then, two, the Court's determination  
09:50 4 regarding the function and structure.

09:50 5 We are arguing at this point only the first issue. And so  
09:50 6 we are not arguing at this point the Court's function and  
09:50 7 structure determinations.

09:50 8 I would like to speak on whether or not these terms should  
09:50 9 receive means-plus-function treatment. And I'd like to start,  
09:50 10 if that's okay with Your Honor, with Claim 25, "apparatus  
09:50 11 comprising a processor and memory including computer program  
09:50 12 code."

09:50 13 And if that's all right, Jason, can you put up their  
09:50 14 Slide 6 regarding disputed processor terms?

09:50 15 This is a slide that we received this morning. It's  
09:50 16 regarding a different patent. It's regarding a different  
09:50 17 patent, and I'm sure they'll talk about it when we get to that  
09:50 18 patent.

09:50 19 But they set forth three factors used in determining  
09:51 20 whether processor itself connotes sufficient structure and is  
09:51 21 not a nonce term.

09:51 22 I don't totally agree with their standard, but for the  
09:51 23 purposes of this argument, we can accept their standard because  
09:51 24 I think we win even under their standard.

09:51 25 The first thing that they say is whether a party seeking

09:51 1 means-plus-function construction has pointed to a record that  
09:51 2 establishes that processors is generic. We have done that.

09:51 3 If you look at Column 9 of the '491 patent, starting at  
09:51 4 Line 31, it says, "For example, the processing element 72 may  
09:51 5 be embodied as a processor, a coprocessor, a controller or  
09:51 6 various other processing means or devices, including integrated  
09:51 7 circuits such as, for example, an ASIC."

09:51 8 I don't know how to be more generic than that. They  
09:51 9 essentially say the processor can be anything.

09:51 10 Point No. 2 is whether the claims in the specification  
09:52 11 provide specific connection and interaction of the claim  
09:52 12 processor with other structural components. Again, they do  
09:52 13 not. There is simply a box that says: This box is a  
09:52 14 processor.

09:52 15 And then, Jason, if you could turn to the next slide.

09:52 16 Category 3, whether the claims and specification describe  
09:52 17 how the data processor accomplishes the claimed functions.  
09:52 18 Again, they do not. And the plaintiff has not explained how  
09:52 19 they do.

09:52 20 So for this reason -- and then I will now cite to the  
09:52 21 highest and best authority, which is Your Honor's ruling  
09:52 22 elsewhere in this case on Claim 1 of the '825 patent, which is  
09:52 23 not being contested further by the plaintiff, at least at this  
09:52 24 hearing, which has strikingly similar language.

09:52 25 Claim 1 of the '825 patent is "at least one memory and the

09:52 1 computer program code are configured, with the at least one  
09:53 2 processor to cause the apparatus to at least..."

09:53 3 That is almost exactly the same as the language in  
09:53 4 Claim 25 of the '491 patent, which simply says "apparatus  
09:53 5 comprising a processor and memory including computer program  
09:53 6 code, the memory and the computer program code configured to,  
09:53 7 with the processor, cause the apparatus at least to..."

09:53 8 We believe that Your Honor's tentative was correct with  
09:53 9 regard to Claim 1 of the '825. And in light of the standard  
09:53 10 set forth by the plaintiff and its application to Claim 25 of  
09:53 11 the '491, we believe that Claim 25 of the '491 should also  
09:53 12 receive means-plus-function status, which would mean that since  
09:53 13 we are not contesting those at this time, Your Honor's  
09:53 14 tentative function and structure with regard to Claim 41 would  
09:53 15 apply to Claim 25 as well.

09:53 16 Thank you.

09:53 17 THE COURT: Thank you, sir.

09:54 18 A response?

09:54 19 MR. MANGRUM: Yes. If I could have the screen back.

09:54 20 Thank you.

09:54 21 This is Brett Mangrum speaking on behalf of plaintiff.

09:54 22 So a couple of points. One, it's interesting they cite to  
09:54 23 authority we address in our briefs concerning instances where  
09:54 24 terms recite means. Here that's not the case.

09:54 25 So as Your Honor is aware, one of the points we raised in

09:54 1 our briefing that's very important here is that Claim 25 is an  
09:54 2 apparatus claim that has -- the body of Claim 25 is very  
09:54 3 similar in limitations to the body of Claim 41. Really the  
09:54 4 only meaningful difference is that Claim 41 is written in  
09:54 5 means-plus-function form. Both are directed to an apparatus.

09:54 6 So if you come to a conclusion that Claim 25 invokes  
09:55 7 means-plus-function and the parties have agreed that Claim 41  
09:55 8 does so, what you have is two independent claims that have  
09:55 9 literally no difference in scope.

09:55 10 And that gives rise to a presumption, and it's a strong  
09:55 11 presumption in this instance, under the Doctrine of Claim  
09:55 12 Differentiation that when the patentee used "means for" for one  
09:55 13 independent claim in reciting certain limitations and did not  
09:55 14 use "means for" in another apparatus claim in reciting  
09:55 15 virtually identical limitations, that the distinction was  
09:55 16 intentional.

09:55 17 And under the Doctrine of Claim Differentiation, those  
09:55 18 terms must be given -- or sorry -- those independent claims  
09:55 19 must be given different scope and meaning.

09:55 20 That was our primary argument. We cited to Al-Site for  
09:56 21 that proposition. That's a Federal Circuit case. And we  
09:56 22 believe that it's -- as an extension of the Doctrine of Claim  
09:56 23 Differentiation, that's important.

09:56 24 There's also a secondary presumption that we have to  
09:56 25 overcome that, again, wasn't part of those cases that they

09:56 1 cited from our slide deck, which is that the lack of the words  
09:56 2 "means" in Claims 13 and 25 gives rise to a rebuttable  
09:56 3 presumption that the terms don't invoke means-plus-function.

09:56 4 In the absence of Claim 41, this might have been a closer  
09:56 5 call. But Claim 41 really is the nail in the coffin for their  
09:56 6 construction because it leaves no doubt that if you want to  
09:56 7 have Claim 25 and Claim 41 have difference in meaning and  
09:56 8 scope, you must conclude that Claim 25, the apparatus claim,  
09:56 9 does not invoke means-plus-function construction when Claim 41  
09:57 10 does.

09:57 11 And this is further compounded by Claim 13, which also in  
09:57 12 its body has limitations that match up line for line almost  
09:57 13 with Claims 25 and 41.

09:57 14 The difference between Claims 13 and 25 is that, one,  
09:57 15 Claim 13 is directed to a computer program product and then  
09:57 16 the -- which is, as we explained in our briefing, more of the  
09:57 17 Beauregard form of claim drafting, whereas Claim 25 is directed  
09:57 18 to an apparatus.

09:57 19 But beyond that, the limitations are largely identical.  
09:57 20 So, again, we submit the presumptions that weren't even  
09:57 21 referenced in opposing counsel remarks and were hardly rebutted  
09:57 22 in the briefing, those presumptions are significant here, and  
09:57 23 they stand unrebutted.

09:57 24 THE COURT: A response?

09:57 25 MR. WARREN: Sure, Your Honor.

09:57 1 I'm a little puzzled by counsel's argument, which  
09:58 2 primarily said that the slides that we put up about the  
09:58 3 disputed processor terms concerned a term where the word  
09:58 4 "means" appears. That's simply not correct.

09:58 5 If you look at Page 9 of the Court's claim construction,  
09:58 6 tentative, or it's Page 9 of mine, I'm not sure if it's the  
09:58 7 same. That term is "said processor configured to provide," and  
09:58 8 there's a dispute there about whether or not that's subject to  
09:58 9 means-plus-function. The word "means" does not appear there at  
09:58 10 all. So we are -- we're in the same place in terms of the  
09:58 11 presumption in that case -- or on that term as we are here.

09:58 12 Counsel also made an argument regarding claim  
09:58 13 differentiation. The Al-Site case, if you look at their brief  
09:58 14 on Page 7 of their reply brief, they actually don't cite the  
09:58 15 Al-Site brief for this. They cite the Matthews Patent Digest  
09:58 16 interpretation of the Al-Site case.

09:58 17 I don't agree with that interpretation. I don't think  
09:58 18 it's correct. But it doesn't matter because I have much higher  
09:59 19 authority, which is Your Honor's findings again, elsewhere in  
09:59 20 these very cases again, uncontested by plaintiff during this  
09:59 21 hearing, specifically with regard to Claim 16 of the '563  
09:59 22 patent, and that is in the 581 case.

09:59 23 And in that case Your Honor found that an alerting unit  
09:59 24 configured to issue an alert was subject to 112(6) despite the  
09:59 25 fact that there was an equivalent "means for" claim.

09:59 1 And I agree with Your Honor that claim differentiation  
09:59 2 does not require a "means for" claim to eliminate  
09:59 3 means-plus-function treatment. They are subject to the --  
09:59 4 other claims are subject to the regular Williamson analysis,  
09:59 5 and there is obviously a different presumption. And we  
09:59 6 acknowledge that, and we believe we've overcome that.

09:59 7 But the existence of one claim that says "means for" is  
10:00 8 not a "get out of means-plus-function treatment free card" for  
10:00 9 every other claim in the same patent. There's no case that  
10:00 10 says that it is. It wouldn't make sense that it is. Even the  
10:00 11 Al-Site case that they quote applied the regular Williamson  
10:00 12 analysis, which is required by the Federal Circuit.

10:00 13 We think we win under that analysis, and we think the  
10:00 14 Court properly applied that in the 581 case despite the  
10:00 15 existence of a "means for" claim elsewhere in the same patent.

10:00 16 Thank you, Your Honor.

10:00 17 THE COURT: Anything else from plaintiff?

10:00 18 MR. MANGRUM: Yeah. Just the final point would be, one  
10:00 19 thing we didn't address today, but it's clear in our briefing,  
10:00 20 is that the structure of -- and a difference in what's recited  
10:00 21 in Claim 25 and Claim 24 arises in part from the preamble  
10:00 22 itself.

10:00 23 And we pointed to authority where in reciting Beauregard  
10:01 24 forms of claim drafting, the computable readable storage medium  
10:01 25 having computer readable program code portions stored therein,



10:01 1 that form of claim drafting has been recognized by the courts  
10:01 2 consistently as referring to sufficiently definite structure,  
10:01 3 and then the body of the claim then goes to operations that the  
10:01 4 software performs.

10:01 5 To suggest that that form of claim drafting invokes  
10:01 6 means-plus-function construction, that's against the Beauregard  
10:01 7 claim drafting practice that's been recognized for quite some  
10:01 8 time now.

10:01 9 And, again, for 5 -- Claim 5, I think it's important --  
10:01 10 and you haven't heard any argument today or in Google's  
10:01 11 briefing -- that Claims 5 and 40 -- sorry. I said Claim 5. I  
10:01 12 meant Claim 25.

10:01 13 Claim 25 and 41 are both directed to an apparatus. You  
10:02 14 haven't heard any distinction from opposing counsel today as to  
10:02 15 meaning and scope if the Court were to interpret Claim 25 and  
10:02 16 Claim 41 as both being means-plus-function construction. They  
10:02 17 haven't disputed the fact that that would then render Claim 25  
10:02 18 completely superfluous with Claim 41.

10:02 19 And that's why, again, that -- the presumption here is not  
10:02 20 just a presumption. It's an especially strong presumption when  
10:02 21 you would subsume one claim into another.

10:02 22 And we submit that because of that, because of the  
10:02 23 circumstances unique to this case, and because of the -- the  
10:02 24 lack of the word "means" creates a separate presumption, that  
10:02 25 these presumptions applicable here -- and not always applicable

10:02 1 in the authority that we cited to because in certain instances  
10:02 2 the terms at issue were "means for" terms, that in view of  
10:02 3 that, the -- these applicable presumptions have now been  
10:02 4 rebutted and the preliminary construction should stand.

10:03 5 THE COURT: Anything else for Google?

10:03 6 MR. WARREN: Only if Your Honor has questions.

10:03 7 THE COURT: Okay. Thank you. I'll be back in a few  
10:03 8 seconds.

10:03 9 (Pause in proceedings.)

10:06 10 THE COURT: If we can go back on the record.

10:06 11 The Court is going to maintain its plain and ordinary  
10:06 12 meaning construction.

10:06 13 And the last term to be taken up by Google, I think, is  
10:06 14 "apparatus comprising a processor and memory..." and goes on  
10:06 15 from there.

10:06 16 Counsel?

10:06 17 MR. WARREN: Your Honor, that was the one -- Claim 25 was  
10:06 18 the one that we just argued.

10:06 19 THE COURT: Okay. Good.

10:06 20 MR. WARREN: In light of Your Honor's decision, I will  
10:06 21 reserve on Claim 13, "computer program product comprising."

10:06 22 THE COURT: Okay. Thank you. Then we'll move to the  
10:06 23 plaintiff's terms.

10:06 24 MR. MANGRUM: Your Honor, this is Brett Mangrum. And I'll  
10:06 25 be presenting for the remainder of plaintiff's terms.

10:07 1 We submitted slides this morning pursuant to the Court's  
10:07 2 instructions, both to the court reporter and to opposing  
10:07 3 counsel. I want to make certain that you can see that now as  
10:07 4 the portion of the screen that I'm sharing.

10:07 5 THE COURT: I can.

10:07 6 MR. MANGRUM: Okay. Great.

10:07 7 So, again, this is Brett Mangrum for plaintiff speaking,  
10:07 8 and I'm now looking at Slide 1. I'm going to expand this to  
10:07 9 make certain that the slide numbering can be shown.

10:07 10 And for these terms here we are dealing with a situation  
10:07 11 where there were not "means for" terms recited in either the  
10:08 12 '045 patent or the '585 patent.

10:08 13 So what I'm showing on Slide 2 is the claim language in  
10:08 14 question in two separate patents of two separate cases. I will  
10:08 15 first address Claim 1 of the '045 patent, which is asserted in  
10:08 16 the 574 case. I will then address Claim 9 of the '585 patent  
10:08 17 in the 577 case.

10:08 18 And to be clear, one thing that distinguishes these, and  
10:08 19 we concede this and recognize this, is that in these cases they  
10:08 20 were not separate "means for" claims that had the exact same --  
10:08 21 otherwise had the exact same scope. So that especially strong  
10:08 22 presumption that I referenced earlier does not apply here.

10:08 23 And for that reason, in addressing these particular terms,  
10:08 24 we cited to Optis -- actually, I think it was in response to  
10:08 25 the defendant citing to Optis, but we refer to those same cases

10:09 1 as providing a helpful analysis to determine whether or not  
10:09 2 "processor configured to" in particular, that particular phrase  
10:09 3 invokes 112(6) or not.

10:09 4 And the slides that opposing counsel showed went to a  
10:09 5 discussion of what -- what do you look at in the intrinsic  
10:09 6 evidence that would be helpful in understanding whether or not  
10:09 7 processor is just a black box with no real meaning, just an  
10:09 8 ethereal element, or instead, whether a processor is, as that  
10:09 9 term is typically used in the art and connotes definite  
10:09 10 structure. And the courts look at how that term is used in the  
10:09 11 intrinsic evidence to make that decision.

10:09 12 And so if I could just touch again on the two points  
10:09 13 that -- I was going to skip this, but since they brought it up,  
10:10 14 I want to make sure that it's clear.

10:10 15 So in the Optis case one of the factors that the Court  
10:10 16 considered was whether or not the party seeking a  
10:10 17 means-plus-function construction, in this case the defendant,  
10:10 18 has "pointed to an intrinsic record that establishes that  
10:10 19 'processors' is meant here to generically be anything that  
10:10 20 manipulates data as opposed to connoting structure representing  
10:10 21 what is generally known as a processor."

10:10 22 There was a second important point that's also relevant  
10:10 23 here raised in Optis, and that was whether -- and I'm quoting  
10:10 24 again -- "the claims and specification provide specific  
10:10 25 connection and interaction of the claim processor" -- and that

10:10 1 is in brackets -- "with other structural components."

10:10 2       There was a third point that was relevant in another case  
10:11 3 that I believe, again -- well, we certainly cited to it, but I  
10:11 4 think it was in response to defendants citing to this case, an  
10:11 5 Eastern District of Texas case, St. Isidore Research.

10:11 6       And the quote there is whether "the claims and  
10:11 7 specification describe how the data processor accomplishes the  
10:11 8 claimed functions."

10:11 9       Now, in view of this instruction we felt was helpful, we  
10:11 10 looked then in our briefing at the intrinsic evidence and  
10:11 11 showed instances where the intrinsic evidence supported an  
10:11 12 understanding that here in this particular -- so I'm referring  
10:11 13 to the first case, Claim 1 of the '045 patent, 574 case, said  
10:11 14 "processor configured to provide a preemptive user output when  
10:11 15 the subset of pixels approaches an edge of the set of available  
10:11 16 pixels."

10:11 17       We endeavored to show in our briefing instances where the  
10:12 18 intrinsic evidence matches up with those types of factors that  
10:12 19 would support an understanding consistent with the lack of the  
10:12 20 word "means" that processor connotes sufficiently definite  
10:12 21 structure to avoid application of Paragraph -- of Section  
10:12 22 112(6).

10:12 23       Now, here are -- here's where the river meets the road.  
10:12 24 Here's intrinsic evidence with reference to Processor 4.

10:12 25       That is the element that we identified in the event that

10:12 1 the Court says that this term invokes 112(6), that is the  
10:12 2 structure.

10:12 3 But what does the specification say about the processor?  
10:12 4 And keep in mind, the word "processor" itself is recited in the  
10:12 5 claim as corresponding structure.

10:12 6 So this Figure 15A of Slide 8 and a corresponding example  
10:12 7 description of Figure 15A are particularly important. Now,  
10:12 8 what we see in Figure 15A is a Box 80 of processing circuitry  
10:13 9 and Box 82 of memory, both of those being indicated by these --  
10:13 10 general reference 4 which is Processor 4.

10:13 11 And this is what the corresponding description states.  
10:13 12 Referring to Figure 15A, "The Processor 4 may comprise  
10:13 13 processing circuitry 80 that is configured to read from and  
10:13 14 write to a memory 82. The processing circuitry 80 may also  
10:13 15 comprise an output interface via which data and/or commands are  
10:13 16 output by the Processor 4 and an input interface via which data  
10:13 17 and/or commands are input to the Processor 4."

10:13 18 So I'm reading here from Columns 13, Lines 16 to 21 of the  
10:13 19 '045 patent.

10:13 20 So what we see here is that very explicit description of  
10:13 21 the processor connoting sufficiently physical structure having  
10:14 22 certain operations that are generally associated with a  
10:14 23 physical processor as is known in the art.

10:14 24 Now, in response to pointing to this disclosure, all we  
10:14 25 have from the defendant's side is attorney argument that that's

10:14 1 not enough. Or that this disclosure would not be understood by  
10:14 2 persons of ordinary skill in the art to describe "processor" as  
10:14 3 that "processor" term is normally understood as a term that  
10:14 4 connotes structure.

10:14 5 We don't have expert testimony from their side giving the  
10:14 6 perspective of a POSITA or a person of ordinary skill in the  
10:14 7 art as to how they would interpret this particular disclosure  
10:14 8 referring to processing circuitry and memory and interaction  
10:14 9 between those two all being encompassed within a processor.

10:14 10 But the specification goes on. And after describing --  
10:14 11 I'm sorry. Even in earlier figures it discusses the Processor  
10:15 12 4 in terms of its interoperation, interconnection with other  
10:15 13 elements, physical components of the system.

10:15 14 So on Slide 9 what we've shown is on the left the '045  
10:15 15 patent, Figure 1 with the processor in communication with the  
10:15 16 camera sensor 10.

10:15 17 And then on Figure 3 you have a Processor 4, which here is  
10:15 18 described as host processor in connection with a memory 26,  
10:15 19 user input/output 6, and then also a camera sensor.

10:15 20 Now, there's a dotted line around the camera sensor here  
10:15 21 because the corresponding description in the specification  
10:15 22 refers to the camera sensor is being housed within a hardware  
10:15 23 module 20.

10:15 24 So here you have the host Processor 4 showing an  
10:15 25 interconnection with hardware, right? A hardware module that's

10:15 1 housing a camera sensor. Again, underscoring that from the  
10:16 2 perspective of the patent, the word "processor" is used as it's  
10:16 3 known in the art to connote sufficiently definite structure,  
10:16 4 and it's a physical component.

10:16 5 We also pointed in our briefing to what I've shown here in  
10:16 6 exploded form on Slide 10 from Columns 5 and 6, that the host  
10:16 7 processor 24 and 28 may be a multifunctional processor such as,  
10:16 8 for example, a central processing unit.

10:16 9 And then moving to Slide 11, this slide's important  
10:16 10 because it identifies two aspects of the processor that are  
10:16 11 significant in view of the claim language that's in dispute.

10:16 12 Now, Claim 1 recites the processor term in multiple  
10:16 13 contexts. In order to comply with the Court's order to narrow  
10:16 14 the disputes, the defendant chose to pick this particular said  
10:16 15 processor limitation.

10:16 16 We don't take issue with that. I'm just bringing that up  
10:17 17 to the Court that there are other instances where said  
10:17 18 processor is recited. This is the one they chose to address.

10:17 19 And in this particular instance, the functional language  
10:17 20 they identified is described and attributed within the  
10:17 21 specification to Processor 4, which is why we argued in the  
10:17 22 alternative in the event the processor term as recited invokes  
10:17 23 Paragraph 112(6) that the corresponding structure, as set forth  
10:17 24 in the specification, would be Processor 4.

10:17 25 So what we've shown here on Slide 11 is a Figure 14 -- and



10:17 1 actually it's just a portion of Figure 14 -- that has two  
10:17 2 operational steps, 120 and 122.

10:17 3 One, in the 120 is "detect subset of pixels approaching  
10:17 4 edge of set of pixels." And then in 122, "output preemptive  
10:17 5 user output."

10:17 6 Now, in the corresponding description, both of these are  
10:17 7 attributed to the processor, the same physical element that was  
10:18 8 addressed in earlier slides and in our briefing.

10:18 9 So reading from Column 12, Lines 42 to 48, "then at block  
10:18 10 120 the Processor 4 detects that the subset of pixels, 102, is  
10:18 11 approaching an edge of the set of available pixels. Next, at  
10:18 12 block 122, the Processor 4 provides a preemptive user output  
10:18 13 110."

10:18 14 And then it goes on to describe output 110.

10:18 15 Now, this is not all that the specification provides. But  
10:18 16 this is important because here there's an explicit tether in  
10:18 17 the description between what the defendant has identified as  
10:18 18 functional language for this term and Processor 4.

10:18 19 When you go on, there is -- there are other figures beyond  
10:18 20 just the flowchart that describes the process of detecting and  
10:18 21 outputting.

10:18 22 So here on Slide 12 you have excerpt from Column 10, Lines  
10:19 23 17 to 25 where it talks about, "As this tracking process  
10:19 24 continues, the subset of pixels approaches an edge 103 of the  
10:19 25 set of available pixels. This is illustrated in Figs. 8B, 9B

10:19 1 and 9C." For the convenience of the Court, Figure 9B is also  
10:19 2 shown on Slide 12.

10:19 3 The description goes on to say at Line 20 of Column 10,  
10:19 4 "The Processor 4 is configured to detect when the subset of  
10:19 5 pixels 102 approaches an edge (example, edge 103) of the set of  
10:19 6 available pixels. The Processor 4 is configured to provide, in  
10:19 7 response to that detection, a preemptive user output that  
10:19 8 facilitates or instigates user action."

10:19 9 Okay. Now, but that's not it. That's not all it's  
10:19 10 providing.

10:19 11 So we clearly have a tethering within the specification of  
10:20 12 Processor 4 to the functional description. We clearly have  
10:20 13 descriptions within the specification of the physical nature of  
10:20 14 processor.

10:20 15 But in addition to all of that, in connection with the  
10:20 16 dual-step process of detecting a subset of pixels and  
10:20 17 outputting a preemptive user output, the specification goes on  
10:20 18 to provide examples of how that is accomplished for both of  
10:20 19 those steps.

10:20 20 And so what is shown in Slide 18 is an excerpt from Column  
10:20 21 11, Lines 8 through 26, and I won't read it all into the  
10:20 22 record, but the highlighted part is important.

10:20 23 Starting at Line 8 of Column 11, the specification states,  
10:20 24 "The Processor 4 may be configured to detect the subset of  
10:20 25 pixels 102 approaching an edge of the set of available pixels

10:20 1 100 in a number of different ways. For example..." And the  
10:20 2 disclosure that continues provides an example of how this is  
10:20 3 done for the detection.

10:21 4 But the specification doesn't stop there. As shown in  
10:21 5 Slide 14, there's a further description of the output and it  
10:21 6 provides an example. Slide 13 -- I'm sorry -- Slide 14  
10:21 7 includes a screenshot of Figure 13 from the '045 patent. And  
10:21 8 on the left it includes an excerpt of Column 11, 27 to 42 of  
10:21 9 the '045 patent.

10:21 10 And here, this is important because you have a description  
10:21 11 of how user output 110 may be preemptively provided according  
10:21 12 to an example embodiment. And if I would just for the sake of  
10:21 13 completeness read into the record the first statement appearing  
10:21 14 on Line 27. "In Figure 8B a particular type of user output,  
10:21 15 110, is provided preemptively to avoid loss of tracking when  
10:21 16 the subset of pixels, 102, approaches an edge of the set of  
10:21 17 available pixels, 100."

10:21 18 And then it says, "However, other forms of preemptive user  
10:21 19 output, 110, may be provided." Then it goes on to provide an  
10:22 20 example of how this is accomplished with reference to Figure  
10:22 21 13.

10:22 22 And so keeping in mind that these terms do not recite the  
10:22 23 word "means," the processor configured to terms of the '045  
10:22 24 patent that's recited in Claim 1 only. They don't recite the  
10:22 25 word "means." So there's a presumption that we worked with at

10:22 1 the outset that the terms don't invoke means-plus-function.

10:22 2 We have to also keep in mind who has the burden of proof  
10:22 3 here to show indefiniteness and that the burden of proof is by  
10:22 4 clear and convincing evidence.

10:22 5 The theory advanced by defendant in this case for this  
10:22 6 claim was that the specification discloses no corresponding  
10:22 7 structure.

10:22 8 And keep in mind it's their burden to prove that that is  
10:22 9 true by clear and convincing evidence. The burden doesn't  
10:22 10 shift at any point for this particular term in this discussion  
10:22 11 to plaintiff.

10:22 12 Nevertheless, in the interest of showing that there are --  
10:22 13 that Processor 4 does connote structure, that there's a  
10:23 14 description, and that there's a description associated with the  
10:23 15 functional language. We identified in our brief where that is.  
10:23 16 We've summarized it here.

10:23 17 We submit that in view of what the intrinsic evidence  
10:23 18 shows, the very onerous burden of clear and convincing evidence  
10:23 19 that there's no structure -- that's their theory -- is simply  
10:23 20 not met.

10:23 21 I also want to emphasize that in the briefing that Google  
10:23 22 provided there was no argument that algorithmic structure was  
10:23 23 necessarily required. There's no mention of Aristocrat or WMS  
10:23 24 Gaming. Nevertheless, there are algorithmic disclosure and  
10:23 25 flowcharts shown, and we've emphasized that here.

10:23 1 But that was never an argument that they raised. Their  
10:23 2 argument -- in fact, they worded in the alternative. In their  
10:23 3 opening brief -- I'm sorry -- their responsive brief to  
10:23 4 plaintiff's opening brief, defendants said something to the  
10:23 5 effect of "there's no algorithm or structure and that's why  
10:24 6 it's indefinite."

10:24 7 And so they appear to concede there that either one of  
10:24 8 those would have been sufficient. We submit that there's both,  
10:24 9 but they never made the argument that there necessarily needs  
10:24 10 to be an algorithm.

10:24 11 Had they done so, it still would have fallen flat because  
10:24 12 as shown, there is an algorithm that involves, at a minimum,  
10:24 13 detecting when you approach an edge and then, based off that  
10:24 14 detection, an output. And that there are explicit attributions  
10:24 15 of that functional requirement for those operations, I should  
10:24 16 say, as disclosed in the specification to the Processor 4.

10:24 17 And then, again, Processor 4 itself is described as having  
10:24 18 corresponding electric circuitry on this having -- interfacing  
10:24 19 with other structural components of the system. And it's  
10:24 20 recited in the context of the claims as interconnected and  
10:24 21 interoperating with other components.

10:24 22 So in view of the case law that says, here's some factors  
10:24 23 to consider when you're looking at "process configured to"  
10:25 24 language to assess whether or not the term invokes  
10:25 25 means-plus-function construction.

10:25 1 And keeping in mind for both presumptions, both for  
10:25 2 raising an indefiniteness argument, it's clear and convincing  
10:25 3 evidence, burden of proof. And to rebut the presumption, it's  
10:25 4 not the same burden. We recognize that, but it's still a  
10:25 5 burden for petitioner to rebut that -- we feel that they  
10:25 6 haven't been rebutted here. We feel that the perspective of a  
10:25 7 person of ordinary skill in the art has not been established by  
10:25 8 expert testimony for certain, and then all we have is an  
10:25 9 argument from defendant that in view of all this evidence,  
10:25 10 there is no structure.

10:25 11 And we simply submit that that's not a plausible  
10:25 12 interpretation of the intrinsic evidence before the Court.

10:25 13 THE COURT: A response from Google?

10:25 14 MR. LANIER: Yes, Your Honor. My colleague, Marlee  
10:26 15 Hartenstein, will respond with respect to the '045 patent on  
10:26 16 this issue.

10:26 17 MS. HARTENSTEIN: Thank you, Your Honor. This is Marlee  
10:26 18 Hartenstein for Google.

10:26 19 Your Honor, we accept the Court's --

10:26 20 THE COURT: Welcome to my Court. I look forward to  
10:26 21 hearing you.

10:26 22 MS. HARTENSTEIN: Thank you very much.

10:26 23 Your Honor, we accept the Court's tentative construction  
10:26 24 of this processor term. The arguments that plaintiff just  
10:26 25 presented today have all been addressed in our briefing and

10:26 1 were properly accounted for in Your Honor's tentative.

10:26 2 Unless Your Honor has any specific questions, I do just  
10:26 3 have a quick couple of responsive points.

10:27 4 First, Your Honor, we heard a lot of argument about the  
10:27 5 presumption against the client, Section 112(6), but the  
10:27 6 presumption is just that.

10:27 7 And, Jason, if you could briefly put up Slide 18 for the  
10:27 8 '045 patent. Thank you.

10:27 9 Cases tell us, and we've explained in our brief, that the  
10:27 10 presumption is not strong. And in situations such as this  
10:27 11 where a processor is defined by purely functional terms, you  
10:27 12 can't avoid Section 112(6).

10:27 13 And, further, with respect to their contention that expert  
10:27 14 testimony is required, the Federal Circuit has told us, and we  
10:27 15 have said in our briefs, that that's not the case. Expert  
10:27 16 testimony is not necessary. In fact, the Federal Circuit has  
10:27 17 said that the intrinsic evidence is the most important.

10:27 18 And, lastly, Your Honor, with respect to their arguments  
10:27 19 regarding corresponding structure, plaintiff has a few  
10:27 20 problems.

10:27 21 As a threshold matter, this indefiniteness issue has been  
10:28 22 front and center since January, but this is the first time that  
10:28 23 they've attempted to identify any corresponding structure. So  
10:28 24 at a minimum, this issue is waived. But even if not, their  
10:28 25 argument still substantively fails.

10:28 1 This is a computer-implemented invention, Your Honor. And  
10:28 2 in that case, cases like Williamson has told us that simply  
10:28 3 pointing to a general purpose computer or processor is not  
10:28 4 enough.

10:28 5 What is necessary, what is absent here and what they still  
10:28 6 haven't identified is an algorithm that performs the recited  
10:28 7 function.

10:28 8 At most they show from the specification a simple  
10:28 9 repetition of the functional language of the claim. We can see  
10:28 10 that perfectly on plaintiff's Slide 11. Really, processor is  
10:28 11 used as a placeholder here to describe a few functional  
10:28 12 limitations of this claim.

10:28 13 And unless Your Honor has any other specific questions, we  
10:28 14 accept the Court's tentative, and I'm happy to conclude and  
10:28 15 pass the baton on to the next term.

10:28 16 THE COURT: Okay. I'll be back in a second.

10:29 17 (Pause in proceedings.)

10:29 18 MR. MANGRUM: Your Honor, if I may address one important  
10:29 19 point to correct the record?

10:29 20 THE COURT: Sure.

10:29 21 MR. MANGRUM: So to be very clear, we are not -- I agree  
10:29 22 with what Ms. Hartenstein said at the outset, which is that we  
10:29 23 have summarized here the points we raised in our briefing.  
10:29 24 That's correct. That's what we've presented today.

10:29 25 It's not correct, however, to suggest that we never stated



10:29 1 Processor 4 is the corresponding structure. That's in our  
10:29 2 brief. And, in fact, it's reflected in the Court's  
10:29 3 articulation of the parties' respective positions.

10:29 4 So that's something that we've all argued in our briefing.  
10:29 5 The Court's recognized that's from our briefing. We've argued  
10:29 6 that in the alternative to an interpretation that this term  
10:29 7 does not invoke 112(6).

10:29 8 So to suggest that's being sprung here for the first time  
10:29 9 is a mischaracterization of the record. However, one point I  
10:30 10 want to make clear is when you look at their briefing, and I'm  
10:30 11 happy to go to the --

10:30 12 THE COURT: Let me interrupt you. So --

10:30 13 MR. MANGRUM: Yeah.

10:30 14 THE COURT: And so I have to say that it's always good to  
10:30 15 wake up in the morning and face someone with such passion over  
10:30 16 a means -- a means-plus-function structure. It's rare you get  
10:30 17 this much excitement.

10:30 18 Help me with whether the Processor 4 is adequate  
10:30 19 disclosure of a structure. Does that make sense?

10:30 20 MR. MANGRUM: Yeah. Sorry. Was that a question? It  
10:30 21 didn't come through.

10:30 22 THE COURT: Yes, sir. That was a question.

10:30 23 That was our debate as we were trying to figure out  
10:30 24 whether the -- obviously, the preliminary construction was  
10:30 25 whether it was -- there was an adequate disclosure of a

10:30 1 specific processor. And help me with Figure 4 -- I'm sorry --  
10:31 2 Processor 4 being an adequate structure in this case.

10:31 3 MR. MANGRUM: Sure. So that -- I think I understand your  
10:31 4 question now.

10:31 5 And Processor 4, to be clear, we didn't just say processor  
10:31 6 in general. We were specific in identifying Processor 4 and  
10:31 7 the corresponding description of Processor 4, and that's  
10:31 8 important.

10:31 9 What we didn't do, but we'd be willing to do now if this  
10:31 10 is -- if this is defendant's new argument, is to further  
10:31 11 specify, as we argued from Slide 11 of our demonstratives, that  
10:31 12 the Processor 4 would -- which is itself structure -- would  
10:31 13 effectuate this functional language by executing Steps 120 and  
10:32 14 122 of Figure 14.

10:32 15 Now, there's a reason why we didn't do that in our  
10:32 16 briefing. And the reason is we really kind of had to shoot in  
10:32 17 the dark in our opening claim construction brief because we  
10:32 18 hadn't had any specifics from Google as to their theory of  
10:32 19 indefiniteness. They didn't tell us whether or not they felt  
10:32 20 the term necessarily required disclosure of an algorithm.

10:32 21 In their opening -- sorry -- in their response to our  
10:32 22 opening brief, they still did not say this. They didn't cite  
10:32 23 Aristocrat. They didn't cite WMS Gaming, and they never made  
10:32 24 the argument "this term must disclose an algorithm or it is  
10:32 25 indefinite."

10:32 1 And because they never raised that argument, we figured  
10:32 2 the dispute was more accurately characterized as to whether or  
10:32 3 not Processor 4 provides sufficiently definite structure.

10:32 4 For the first time today, we've now heard from them that  
10:33 5 there must be a disclosure of an algorithm. If that's their  
10:33 6 position, then that doesn't support an indefiniteness argument.  
10:33 7 One simply needs to look to where in the specification there's  
10:33 8 a disclosure of algorithmic structure corresponding to the  
10:33 9 functional language at issue.

10:33 10 And we submit there is. It's what the Processor 4 does,  
10:33 11 and it's expressly tethered in a two-step process to what is  
10:33 12 required in the claim language in dispute. And, again, it's  
10:33 13 Processor 4 that does it.

10:33 14 So a Processor 4 operating Steps 120 and 122 of Figure 14  
10:33 15 would be the structure. This has been analogous structure  
10:33 16 that's been identified in other cases where a processor has  
10:33 17 been found to invoke 112(6).

10:33 18 And to suggest there's no algorithm, there's no structure,  
10:34 19 that, we feel, is inconsistent with the intrinsic evidence and  
10:34 20 not supported by anything other than a blind eye in briefing to  
10:34 21 what is actually disclosed.

10:34 22 THE COURT: Any response?

10:34 23 MS. HARTENSTEIN: Yes, Your Honor.

10:34 24 The algorithm that the plaintiffs point to is that  
10:34 25 flowchart on -- I believe it's Figure 14, but really all that

10:34 1 does is simply repeat the claim language. That doesn't  
10:34 2 disclose an algorithm.

10:34 3 If we look at the term "processor," it's really just a  
10:34 4 catch-all that -- without noting sufficiently detailed  
10:34 5 structure. But even if processor did connote some level of  
10:34 6 structure in and of itself, as we've explained in our brief,  
10:34 7 that's not enough.

10:34 8 The Federal Circuit has told us that the question is not  
10:34 9 if it connotes some level of structure. It's whether they have  
10:34 10 sufficient structure to perform the claim function.

10:35 11 THE COURT: Response to that?

10:35 12 MR. MANGRUM: Yeah. I just -- I don't think that they're  
10:35 13 articulating the correct standard, Your Honor. I think the  
10:35 14 processor is described as being physical. It's described, as  
10:35 15 we showed in Slide 8, as containing processing circuitry, and  
10:35 16 on its own it incorporates some form of memory. It's described  
10:35 17 as being structurally interconnected with other components that  
10:35 18 you didn't hear today or in Google's briefing that are somehow  
10:35 19 ethereal.

10:35 20 There's been no dispute that the processor is described in  
10:35 21 the spec as being connected to physical structure. This is  
10:35 22 also relevant to the analysis and factors courts have  
10:35 23 considered. That's not in dispute, right?

10:35 24 There hasn't been a dispute of how the claim language  
10:35 25 itself interconnects, interoperates the processor with other

10:35 1 recited components.

10:35 2       So they haven't explained why in view of Figure 1,  
10:35 3 Figure 3 and Figure 15A, that somehow the Processor 4 is  
10:36 4 ethereal or a black box and has no corresponding description  
10:36 5 where a person from ordinary skill in the art in view of what's  
10:36 6 disclosed would recognize, oh, when they say "processor,"  
10:36 7 that's what they mean. They mean processor.

10:36 8       We pointed to evidence. We pointed to what the  
10:36 9 specification discloses. There's been no rebuttal to the  
10:36 10 evidence we pointed to other than to say, we don't think it's  
10:36 11 enough.

10:36 12       And they seem to be articulating like a super standard  
10:36 13 of -- I fear that other cases and other authorities that have  
10:36 14 found processors' descriptions to -- even in instances where  
10:36 15 the "processor" term invokes 112(6), that no claim would  
10:36 16 survive.

10:36 17       What else is needed other than a physical description of  
10:36 18 processor, algorithmic disclosure corresponding to the function  
10:36 19 in question and an explicit tether of the "processor" term  
10:36 20 itself to that functional language?

10:36 21       If this doesn't suffice to -- under a clear and convincing  
10:37 22 indefiniteness standard, I would fear that they're flipping the  
10:37 23 standard on its head and putting the onus on patent -- on the  
10:37 24 patentee to disprove an indefiniteness theory.

10:37 25       That's not the standard. That's not the law. And we

10:37 1 think the burden rests with them. It's a high burden, and it  
10:37 2 has not been met.

10:37 3 THE COURT: Anything else?

10:37 4 MS. HARTENSTEIN: Well, Your Honor, just quickly.

10:37 5 They seem to argue that there's some categorical rule that  
10:37 6 we're trying to propose about whether processor would invoke  
10:37 7 Section 112(6).

10:37 8 There's not, nor would I propose one today. It's really a  
10:37 9 case-by-case evaluation: Analyzing the claim language, other  
10:37 10 intrinsic evidence, applying the principles of Williamson and  
10:37 11 its progeny, like this Court has done in its tentative  
10:37 12 construction.

10:37 13 The rest of what Mr. Mangrum has said, I do believe our  
10:37 14 briefs have addressed those points. Thank you.

10:37 15 THE COURT: I rarely do this, but I will -- I'm -- you all  
10:38 16 have been -- done a good job of not confusing, but I think that  
10:38 17 both sides make compelling arguments.

10:38 18 You will -- we will get -- I'll have my clerks let you  
10:38 19 know in the next day or so what we're going to do with this  
10:38 20 claim term.

10:38 21 And so let's move on to the next one. Give me one second.

10:38 22 Okay. Yeah. I mean, we've spent -- probably of all the  
10:38 23 claim terms, that was the one we spent the most time trying to  
10:38 24 get right. So it was -- we thought it was a difficult one. So  
10:38 25 give me one second.

10:38 1 The next claim term to take up is "client management  
10:38 2 processor configured." And, again, for the same reason as the  
10:38 3 last one, this one is one that will be started with  
10:39 4 Mr. Mangrum.

10:39 5 (Clarification by the reporter.)

10:39 6 MR. MANGRUM: What would we do without that helpful  
10:39 7 prompting? Thank you. And thank you also for your e-mail and  
10:39 8 reminding me to do that before the hearing even started.

10:39 9 So Brett Mangrum for plaintiff. And I am sharing my  
10:39 10 slides, the same slide deck. Here we're starting at Slide 16.  
10:39 11 And for the sake of efficiency, we intend to address the  
10:39 12 "processor" terms of Claim 9 collectively.

10:39 13 They're all recited in the same claim. We're calling them  
10:39 14 the "processor" terms in that they are all -- all three terms  
10:39 15 recite "processor configured to." However, they're recited in  
10:40 16 unique context in the sense that there's qualifying terms  
10:40 17 preceding each "processor configured to."

10:40 18 And we've -- as you can see here on Slide 16, like for  
10:40 19 Term No. 3 -- and these are the numberings the parties used for  
10:40 20 briefing purposes -- the "client manager" -- "management  
10:40 21 processor" is the first term, a "detection processor" is the  
10:40 22 second term, and then a "collaborative application management  
10:40 23 processor" is the third term.

10:40 24 Now, as set forth in our briefing, those qualifying terms  
10:40 25 are important in the sense that it helps because the concept of

10:40 1 processors that are specifically dedicated to certain purposes  
10:40 2 is disclosed in the '585 patent. The patent uses qualifying  
10:40 3 terms to be able to differentiate between processors.

10:40 4 So, again, in each instance, a processor's not referring  
10:41 5 to all -- just a black box processor in general. Rather, these  
10:41 6 claim nomenclature, this qualifying language is intended to  
10:41 7 invoke the -- or simply reflect the corresponding description  
10:41 8 in the specification.

10:41 9 So when you see "client management processor," that's what  
10:41 10 you should look for in the specification, something that's  
10:41 11 referred to as client management or detection or collaborative  
10:41 12 application, et cetera.

10:41 13 And what we did then in our analysis, following the same  
10:41 14 instructive authority of the cases we cited, including Optis  
10:41 15 and others, is look at the intrinsic evidence and see what the  
10:41 16 specification states with respect to those processor terms, how  
10:41 17 they're described. And then in view of that explain why the  
10:41 18 defendant has not met its burden to show that there is -- and  
10:41 19 their theory, again, is that there's no structure.

10:41 20 And here, again, there wasn't an argument in the briefing  
10:42 21 at least that there's a lack of structure because there must be  
10:42 22 algorithmic structure.

10:42 23 The briefing simply focuses on the argument that there is  
10:42 24 no structure, algorithm or otherwise. There's just nothing in  
10:42 25 the specification that could be attributed to a structure.



10:42 1 And keep in mind in this instance, in interpreting how the  
10:42 2 specification would be understood from a person of ordinary  
10:42 3 skill in the art, all that the defendant offers is attorney  
10:42 4 argument.

10:42 5 And our position is not that you must in all instances  
10:42 6 have expert testimony to support a conclusion of indefiniteness  
10:42 7 when you're considering whether the terms invoke  
10:42 8 means-plus-function, whether or not there's sufficient  
10:42 9 structure disclosed. That's not our position.

10:42 10 But our position is this: The dispute here is unique in  
10:42 11 that you're asking whether or not the intrinsic evidence --  
10:42 12 there could -- whether or not the intrinsic evidence discloses  
10:43 13 what a person of ordinary skill in the art would understand to  
10:43 14 be reasonably certain structure.

10:43 15 And to have that perspective and to be able to interpret  
10:43 16 what is disclosed and what's tethered to these functional  
10:43 17 requirements and suggest, "ignore this disclosure or this is  
10:43 18 not enough, this disclosure's not enough or this one's not  
10:43 19 enough," based off of attorney argument is problematic for  
10:43 20 defendants in view of the standard of clear and convincing  
10:43 21 evidence.

10:43 22 That's the point we raised is that under the particular  
10:43 23 circumstances of this case where they are attempting to  
10:43 24 interpret what is disclosed in the specification and saying  
10:43 25 either, A, it's not tethered or, B, it's not structured, or

10:43 1 it's not what someone skilled in the art would understand to be  
10:43 2 definite structure, that's an attorney argument based off a  
10:43 3 factual interpretation that's within the purview of expert  
10:44 4 report. That's one of the problems they have.

10:44 5 So I've -- moving on to Slide 18. I've reemphasized this  
10:44 6 point from Optis that I'm highlighting now on the slide,  
10:44 7 whether the claims and specification provide specific  
10:44 8 connection and interaction of the claimed processor with other  
10:44 9 structural components.

10:44 10 And so we address this in our briefing with respect to  
10:44 11 examples. And I haven't summarized here everything that's in  
10:44 12 our briefing, but it's important to recognize that Claim 9  
10:44 13 expressly recites the client management processor term as, one,  
10:44 14 structurally tied to an electronic message client.

10:44 15 And there's been no dispute as to -- at least in that --  
10:44 16 as recited in the claim that that's structure.

10:44 17 And, two, enabling the user to select an electronic  
10:44 18 message from the inbox where the plurality of electronic  
10:44 19 messages are qualified as being stored in a message storage  
10:44 20 database, that database also being a structural component. We  
10:45 21 have no expert testimony to confirm otherwise.

10:45 22 Claim 9 also with respect to the detection processor term  
10:45 23 recites that term in an interactive context with other  
10:45 24 structural components of the term. And this is expressed, for  
10:45 25 example, in the requirement that it must be configured to

10:45 1 detect the action defined in the archiving rule assigned to the  
10:45 2 selected electronic message was carried out.

10:45 3 And our point raised in the briefing was the detection  
10:45 4 processor logically cannot detect the action was carried out --  
10:45 5 that's a requirement recited -- unless the detection processor  
10:45 6 is structurally tied to at least the portion of the  
10:45 7 communication system carrying out that action.

10:45 8 Logically, one flows from the other. How do you make a  
10:45 9 detection, a real-world detection in the absence of having some  
10:45 10 type of interrelationship with other real-world components?

10:46 11 So, again, this is relevant to the Optis analysis when you  
10:46 12 look at claim language and look at interactions with other  
10:46 13 structural components.

10:46 14 Referring now specifically to the first of the three  
10:46 15 terms, the '585 patent specification expressly ties certain  
10:46 16 exemplary structure to the alleged functional language for  
10:46 17 client management processor.

10:46 18 What we've done in Slide 17 is highlight the e-mail  
10:46 19 client, right? It resides at a specific location within the  
10:46 20 system. It houses messages. It's described structurally as  
10:46 21 having certain algorithm structure and features. And this --  
10:46 22 with respect to Figure 1, it sits at the top left-hand side of  
10:46 23 the figure.

10:46 24 The '585 patent expressly ties certain exemplary structure  
10:46 25 to the alleged functional language for the client management

10:46 1 processor, as shown in Slide 18 at Column 4, Lines 8 through  
10:46 2 23.

10:46 3 I won't read this into the record, but it's clear that  
10:47 4 there's a description of the electronic message client to  
10:47 5 enabling the user, among other things, to select a message from  
10:47 6 the inbox to be transferred. That's one of the functional  
10:47 7 requirements according to defendant's interpretation of  
10:47 8 means-plus-function construction.

10:47 9 But then it says more precisely and goes on to explain how  
10:47 10 this can be effected according to the example embodiment. You  
10:47 11 don't have a black box that merely reflects the claim language  
10:47 12 but rather exemplary disclosure directed to how this could be  
10:47 13 effected.

10:47 14 Now, obviously for the purposes of slide presentation,  
10:47 15 it's difficult to put the entire disclosure relevant to the  
10:47 16 client management processor within a slide.

10:47 17 Our point here is simply to state that it's not our burden  
10:47 18 to defend the definiteness of a claim that the Patent Office  
10:47 19 issued. It's defendant's burden to prove their theory that  
10:47 20 there is no structural disclosure.

10:47 21 And that's plainly false when you have explicit disclosure  
10:47 22 directed to the elements that are expressly attributed to the  
10:48 23 functional language and that there's an exemplary disclosure of  
10:48 24 how the functional language is to be effected.

10:48 25 So the only thing you could get to is not that there's

10:48 1 nothing disclosed, but somehow according to attorney argument  
10:48 2 only, it's not enough.

10:48 3 What we've done then in Slide 18 is highlight the  
10:48 4 structure we identified corresponding to the detection  
10:48 5 processor term. We identified this structure as corresponding  
10:48 6 to the detection processor term because that's what the patent  
10:48 7 does.

10:48 8 Now, I recognize here it might be a little difficult from  
10:48 9 the perspective of the slide. So what I'm going to do with my  
10:48 10 screen is zoom in a little bit so you can maybe read it better.

10:48 11 The intent here is to simply emphasize for the Court in  
10:48 12 our briefing we identified Elements 14a, 14a, 14c and 14d,  
10:48 13 various agents operating according to the description in the  
10:48 14 specification as performing the alleged functional language for  
10:49 15 the detection processor.

10:49 16 Let me scroll back out so you can see the entire slide.

10:49 17 Moving on to Slide 20.

10:49 18 We identified exemplary disclosure within the '585 patent,  
10:49 19 specifically attributing the detection processor functional  
10:49 20 language to these different agents, 114a to 114d, that are  
10:49 21 disclosed in the structural context within the figure we just  
10:49 22 showed.

10:49 23 The first appears at the bottom of Column 5, and then it  
10:49 24 ultimately extends to the top of Column 6. And reading into  
10:49 25 the record the overall description, it says, "Periodically, or

10:49 1 when the electronic message client 2 is closed by the user, the  
10:49 2 archiving rule is transmitted to the communication system 1 to  
10:49 3 be stored in the database 116. The message will be moved when  
10:50 4 the action contained in the archiving rule is detected by the  
10:50 5 communication system 1."

10:50 6 Then moving on to Column 6, Lines 1 through 14, and I  
10:50 7 won't read the whole thing, but I want to emphasize a few  
10:50 8 points that are highlighted here.

10:50 9 Again, reading from Slide 12 (sic), "Detection of the  
10:50 10 performance of an action is rendered possible by using  
10:50 11 different agents, 114a to 114d, as mentioned above that control  
10:50 12 the different means of the communication system."

10:50 13 Then it says more precisely, and it goes into the  
10:50 14 differentiation between 14a and 14d -- or -- well, 14a, b, c  
10:50 15 and d -- in providing a more precise description of how they  
10:50 16 operate under certain circumstances to detect by the  
10:50 17 communication system when the action contained in the archiving  
10:51 18 rule is affected.

10:51 19 So, again, what I show on Slide 20 is a portion of the  
10:51 20 specification directed to 14a. Slide -- scroll down here.

10:51 21 Slide 21 then addresses the 14b and provides exemplary  
10:51 22 disclosure under certain embodiments of how the 14b can  
10:51 23 operate.

10:51 24 Slide 22 addresses 14d. And we have a description here  
10:51 25 also -- I believe this is 14c on Slide 28.

10:51 1 And so our point, Your Honor, is to simply say that while  
10:51 2 we pointed to the specific structural elements that the  
10:51 3 specification directly attributes to the functional language in  
10:51 4 question, in each instance there's exemplary description  
10:52 5 associated with each one of those agents in describing how they  
10:52 6 operate and interoperate with other components of the system.

10:52 7 To reach the conclusion that there is no structure  
10:52 8 disclosed, one would simply have to look past all the  
10:52 9 structural description of the agents and how they operate and  
10:52 10 also look past the explicit tethering within the specification  
10:52 11 itself of this exemplary disclosure to the functional language,  
10:52 12 the tethering being affected by use of the same qualifying  
10:52 13 terms appearing before the processor terms in question in Claim  
10:52 14 9, I believe it is. And using that same terminology within the  
10:52 15 specification. And then also discussing the functional aspects  
10:52 16 of Claim 9 in the context of those specific structural  
10:52 17 components.

10:52 18 Okay. And then, finally, the collaborative application  
10:52 19 management processor. Your Honor, this -- I'm on Slide 24 now  
10:53 20 and I'm also showing an excerpt of Figure 1 of the '585 patent.

10:53 21 Highlighted on Slide 24 are the various databases that  
10:53 22 appear connected to the collaborative agent 14 -- sorry --  
10:53 23 114c. Included there is the Wiki 107, the blog 108, the FAQ  
10:53 24 109, RSS 110, task 111 and planning 112.

10:53 25 And it shouldn't be surprising that in each one of these

10:53 1 instances, these structural database components are described  
10:53 2 in turn and in terms of their operations and how they affect  
10:53 3 their respective purposes. These are explicitly tethered in  
10:53 4 the figure and in the descriptions to the collaborative agent  
10:53 5 interoperating within this overall system.

10:53 6 And, again, they're characterized as databases. And we  
10:53 7 have no evidence, other than attorney argument only from  
10:54 8 opposing counsel, that these databases themselves do not  
10:54 9 connote structure.

10:54 10 We would submit that the term "database" is a known  
10:54 11 term in the art. It's a known term to connote structure, and  
10:54 12 it's not used any differently here in the '585 patent than it  
10:54 13 is just in general in terms of a structural term known in the  
10:54 14 competing arts.

10:54 15 And, in fact, this is confirmed by use of -- and I'm going  
10:54 16 to use my mouse here over Slide 24 -- symbolically use of this  
10:54 17 cylinder form is a symbolic representation of a database. It's  
10:54 18 referred to as a database. It's drawn as a database. Its  
10:54 19 operations are described in the context of a database. We  
10:54 20 submit that that's the structure, the database structure.

10:54 21 And the corresponding description, again, is tethered to  
10:54 22 the functional language. It uses the same qualifying terms  
10:55 23 "collaborative application" in describing those databases.

10:55 24 And because of that explicit tethering, the commonality in  
10:55 25 the language and the recitation of structure, including its



10:55 1 operation under example embodiments, we submit that for this  
10:55 2 term, like all other of the disputed terms claims of Claim 9,  
10:55 3 that you simply -- it's indefensible to say that there is no  
10:55 4 corresponding structure. And that's why it's indefinite.

10:55 5 There is corresponding structure. And we submit that  
10:55 6 what's disclosed is sufficient and that the defendant has not  
10:55 7 met the burden of clear and convincing evidence in view of what  
10:55 8 the specification discloses.

10:55 9 And with that, I'll stop sharing. And I can take  
10:55 10 questions, but that's our presentation for today, Your Honor.

10:55 11 THE COURT: Okay. If I could hear a response from Google.

10:55 12 MR. LANIER: Yes, Your Honor. Tracy Stitt will respond on  
10:55 13 this term. Thank you.

10:55 14 MS. STITT: Thank you, Your Honor. Tracy Stitt for  
10:55 15 Google.

10:55 16 And much like Ms. Hartenstein with respect to this term,  
10:56 17 we accept the Court's preliminary construction. And with the  
10:56 18 presentation that we just heard, I didn't hear any new  
10:56 19 arguments that weren't presented in the briefs. And we feel  
10:56 20 that our briefs fully address those arguments, and those  
10:56 21 arguments were fully accounted for in Your Honor's preliminary  
10:56 22 constructions.

10:56 23 With that being said, unless you have specific questions,  
10:56 24 I'd like to respond on a few points.

10:56 25 First, in terms of the requirement for an algorithm, I

10:56 1 direct you to Page 25 of our opening brief where we did, in  
10:56 2 fact, make the argument that there was no algorithm disclosed  
10:56 3 for these particular terms. So I wanted to correct the record  
10:56 4 on that.

10:56 5 Second, you heard a lot from Mr. Mangrum about qualifying  
10:56 6 terms in -- with respect to these particular means -- or these  
10:56 7 particular terms. And I direct you -- he had Slide 11, his  
10:56 8 Slide 11 where he referred to the client management processor  
10:56 9 and the detection processor.

10:56 10 The qualifying terms that he relies on really are not  
10:56 11 structural descriptors, and we said this in our brief.

10:57 12 Client management and detection merely describe the  
10:57 13 function that is attributed to those processors. It does not  
10:57 14 give you any structural detail, nor do the claims explain  
10:57 15 anything as to how those functions are achieved.

10:57 16 The assertion that the client management processor is  
10:57 17 structurally tied to an electronic message client in and of  
10:57 18 itself is not sufficient to disclose structure to avoid the  
10:57 19 presumption -- or to avoid the application of 112(6). And I  
10:57 20 would direct you to the Media Rights case for that proposition.

10:57 21 Similarly, with respect to the detection processor,  
10:57 22 detection is not a structural connotation. It simply describes  
10:57 23 a function.

10:57 24 They didn't make any similar argument with respect to the  
10:57 25 last processor, the collaborative application management

10:57 1 processor in terms of the claims itself.

10:57 2 Similarly, as Ms. Hartenstein said, I believe that we have  
10:57 3 addressed their arguments with respect to the requirement of  
10:57 4 expert testimony here. We do not believe that expert testimony  
10:58 5 is required. And, in fact, the citations that they make to  
10:58 6 their specification demonstrate that it is apparent that  
10:58 7 there's no structural description for these terms. And, in  
10:58 8 fact, they are only described in terms of their function.

10:58 9 To address Slide 17 through 25 where Mr. Mangrum  
10:58 10 pointed to particular cites from the specification. Some of  
10:58 11 these are a little more detailed than what we saw in their  
10:58 12 briefs, but we believe that these have all been sufficiently  
10:58 13 addressed in our briefing. And they all -- regardless, they  
10:58 14 all suffer from the same substantive laws, and they add nothing  
10:58 15 to the substance.

10:58 16 And the problem is that nothing in the spec, in fact,  
10:58 17 describes anything other than the function of these particular  
10:58 18 processors.

10:58 19 For example, if we look at Slide 20 that Mr. Mangrum put  
10:59 20 up, he discusses the detection processor and he relies on  
10:59 21 language that talks about the detection processor is  
10:59 22 rendered -- excuse me. "Detection of the performance of an  
10:59 23 action is rendered possible by using different agents." This  
10:59 24 is at 6 -- Column 6, Lines 1 through 14.

10:59 25 And it goes on to describe that "regular analysis by such

10:59 1 agents enables detection of the events effected on such means."  
10:59 2 All that does is describe the function of this processor. It  
10:59 3 does not explain any structural detail with respect to the  
10:59 4 processor in terms of circuitry or provide any other  
10:59 5 explanation as to how that processor operates. And we know  
10:59 6 from the case law that that is what is required here.

10:59 7 And for that reason, as we've stated in our briefs, for  
10:59 8 none of these three terms does there exist a disclosure of  
10:59 9 sufficient structure.

10:59 10 If Your Honor has any particular questions, I would be  
10:59 11 happy to answer them. Otherwise, I think the arguments have  
10:59 12 been addressed in our briefs.

10:59 13 THE COURT: Mr. Mangrum, any response?

11:00 14 MR. MANGRUM: Yes, Your Honor. Thank you for the  
11:00 15 opportunity.

11:00 16 I want to share my screen, and I want to read into the  
11:00 17 record exactly what the defendant said in its briefing because  
11:00 18 I think there's a misrepresentation today of what was said.

11:00 19 So I have that now. This is -- I just pulled up their  
11:00 20 brief, and I've highlighted the section I want to read into the  
11:00 21 record.

11:00 22 Their argument in their briefing on the page that was just  
11:00 23 cited is, "Instead, the specification simply repeats each  
11:00 24 claimed function, but it does not provide any algorithm or  
11:00 25 other structure for carrying out that specific function."

11:00 1 So we understood from their argument that there wasn't --  
11:00 2 this -- the claim language did not invoke like a WMS Gaming or  
11:00 3 Aristocrat type of discussion. They never raised that. We  
11:00 4 thought it didn't either, and so we didn't address that in our  
11:00 5 briefing.

11:00 6 They did not say, "it must disclose an algorithm and other  
11:01 7 structure," or they didn't just -- if -- the problem is they're  
11:01 8 reading this statement now as if they never said "or other  
11:01 9 structure." And they're reading it as if they said the  
11:01 10 specification simply treats each claimed function, but it does  
11:01 11 not provide any algorithm, period.

11:01 12 That's not what they said. It's not what they argued.  
11:01 13 And so naturally in our response we addressed it based off --  
11:01 14 because they're the party with the burden -- based off what  
11:01 15 they argued.

11:01 16 If Your Honor feels that this term somehow invokes  
11:01 17 WS Gaming or Aristocrat and that there needs to be some type of  
11:01 18 algorithmic structure disclosed in addition to the specific  
11:01 19 structural components that we identified, then we would submit  
11:01 20 that that would probably be appropriate for supplemental  
11:01 21 briefing because it wasn't briefed by Google.

11:01 22 And then also -- I just want to point out when they  
11:01 23 cherry-picked from the slides that we showed, the slides  
11:02 24 were -- not every slide was intended for the same purpose.

11:02 25 We showed slides first of all to establish that there was

11:02 1 an explicit tethering or connection between the particular  
11:02 2 component, the structural component identified in the  
11:02 3 disclosure in the specification to the functional language in  
11:02 4 question.

11:02 5 And it stands to reason that in those instances, this --  
11:02 6 I've written hundreds of patents, and it's normal practice when  
11:02 7 you are introducing a term that you intend to match up with  
11:02 8 certain claim language that you match the claim language. You  
11:02 9 write the term, and you match the claim language, and then what  
11:02 10 follows is additional corresponding description under certain  
11:02 11 example embodiments.

11:02 12 So to show that certain structural components are  
11:02 13 explicitly tied to the alleged functional language, we pointed  
11:03 14 to instances in the specification where this is so. But then  
11:03 15 following that, we identified other instances of exemplary  
11:03 16 disclosure.

11:03 17 And I agree. I think the record reflects that our  
11:03 18 presentation today is an accurate summary of the briefing and  
11:03 19 that the record and the intrinsic evidence speaks for itself.

11:03 20 If you just do a control F on the structural components we  
11:03 21 identified, you'll see them referenced throughout the  
11:03 22 disclosure, each one of them in the context of the description  
11:03 23 of example embodiments describing how those particular  
11:03 24 components operate, what they do, what they are, where they're  
11:03 25 located and how they interact with other components.

11:03 1 In view of that disclosure, to reach the conclusion that  
11:03 2 there's no structure at all, we submit, again, it's just not  
11:03 3 consistent. And to the extent Your Honor wants to entertain a  
11:03 4 separate disclosure -- or sorry -- a separate dispute as to  
11:03 5 whether or not an algorithmic disclosure is necessary, we would  
11:04 6 submit it's extraneous to the present briefing, and that would  
11:04 7 warrant additional supplemental briefing.

11:04 8 MS. STITT: Your Honor, if I may respond briefly.

11:04 9 THE COURT: Yes, ma'am.

11:04 10 MS. STITT: With respect to whether there is -- an  
11:04 11 algorithm is required, this is a computer-implemented  
11:04 12 invention.

11:04 13 The functions that are described by these processors are  
11:04 14 special-purpose functions. And so, therefore, I think that --  
11:04 15 to say that an algorithm may not be required or that we didn't  
11:04 16 suggest that it would be belies the record.

11:04 17 And second, with respect to the slides, I'm happy to go  
11:04 18 through each of them in more detail to explain why what's cited  
11:04 19 on those slides fails to explain any structural detail or  
11:04 20 describe these processors in anything other than functional  
11:04 21 language.

11:04 22 There's no disclosure as to how the particular processor  
11:04 23 performs or operates so as to accomplish the function. It's  
11:04 24 merely described in terms of the function itself, and that is  
11:04 25 insufficient under either Step 1, to determine whether there is

11:05 1 a means-plus-function analysis that should be applied, or Step  
11:05 2 2, which is once you get there, whether there's sufficient  
11:05 3 structure disclosed in the specification.

11:05 4 THE COURT: Anything else?

11:05 5 MR. MANGRUM: None from the patent owner. Or sorry. From  
11:05 6 the plaintiff, Your Honor. And I appreciate the opportunity.

11:05 7 THE COURT: You're very welcome. I'll be back in a few  
11:05 8 seconds.

11:05 9 (Pause in proceedings.)

11:08 10 THE COURT: If we can go back on the record.

11:08 11 The Court is going to maintain its preliminary claim  
11:08 12 constructions with respect to all of those arguments on  
11:08 13 Claim 9, which I think leaves us with one final argument on the  
11:08 14 579, "client-side compositing of media streams."

11:08 15 Mr. Mangrum?

11:08 16 MR. MANGRUM: Yes, Your Honor. I'll be arguing this term  
11:08 17 as well.

11:08 18 For this one, I think it might be helpful just to do a  
11:08 19 side-by-side comparison of Claims 1 and 7. If I can share.

11:09 20 Your Honor, if you can confirm that this is not too small  
11:09 21 a text to be able to see.

11:09 22 THE COURT: Well, that's a little hurtful. No.

11:09 23 (Laughter.)

11:09 24 THE COURT: No. It's fine. Actually, my reading  
11:09 25 eyesight's great. Not so good long-distance driving, but I



11:09 1 still can read without glasses. So I'm in good shape. Thank  
11:09 2 you.

11:09 3 MR. MANGRUM: Well, just to be clear, my -- when I share  
11:09 4 this in this way, I don't see exactly what you're seeing. So I  
11:09 5 wanted to be certain. But thank you for confirming that.

11:09 6 So what I've done here is try to highlight using different  
11:09 7 coloring a slide-by-slide comparison of Claims 1 and 7. This  
11:09 8 is -- so we've moved on to a different case. This is the 579  
11:09 9 case. It's the '180 patent.

11:09 10 And what's important to recognize here for the '180 patent  
11:09 11 is that these various method claims are expressly written from  
11:09 12 the perspective of a particular device. This is not disputed.  
11:10 13 You can see that in both parties' briefings.

11:10 14 So in Claim 7, there's a method for client-side  
11:10 15 compositing of media streams by a video server. Okay? And  
11:10 16 then the method instead in Claim 1 is appropriately directed to  
11:10 17 operations by a video display device.

11:10 18 What I've highlighted within the body of the claims for  
11:10 19 Claim 7 is that after every operative gerund that introduces a  
11:10 20 step, like generating, multiplexing, transmitting, there's a  
11:10 21 comma and then an affirmation of what's clear in the preamble,  
11:10 22 which is that all these things are done by a video server.

11:10 23 If anything, the portion of the preamble that should be  
11:10 24 limiting is "via video server."

11:10 25 Why? Because in each instance in the body of the claim,

11:11 1 the word "the video server" derives its antecedent basis from a  
11:11 2 video server. And it's explicit for each step that's required  
11:11 3 what component is doing it because after -- again, after the  
11:11 4 gerund, it says "by the video server."

11:11 5 Now, you juxtapose this with the context of Claim 1. So  
11:11 6 to emphasize the distinction I've colored differently -- maybe  
11:11 7 it'll come out on your screen somewhat orange -- of instances  
11:11 8 where "by a video display device" or "the display device" is  
11:11 9 emphasized.

11:11 10 So in each instance when you have an operative gerund  
11:11 11 introducing a step, here it's receiving, demultiplexing and  
11:11 12 displaying, the -- it looks like I missed one. I should have  
11:11 13 highlighted this orange as well, right here after receiving.

11:11 14 But in every instance what you have is an antecedent  
11:12 15 reference to the preamble requirement, "by a video display  
11:12 16 device." And in every instance you have specifically called  
11:12 17 out what component is doing the step.

11:12 18 Now, the displaying step is of particular importance, and  
11:12 19 I've highlighted this yellow to emphasize that after it says  
11:12 20 "displaying, by the video display device," there's the  
11:12 21 statement, "the at least one media substream on the display  
11:12 22 screen according to the compositing-instruction substream. The  
11:12 23 compositing-instruction substream, including instructions on a  
11:12 24 composition of the at least one media substream."

11:12 25 So you have to do the compositing at the video display

11:12 1 device because it's recited, right?

11:12 2 Now, why is that significant? When you -- we start with a  
11:12 3 preamble assessment with the presumption that the preamble's  
11:13 4 not limiting, and the -- or a portion when you bifurcate  
11:13 5 selections of a preamble. Because we don't dispute that "via  
11:13 6 the video display device" is limiting because it's the thing  
11:13 7 that provides antecedent basis for each instance of "the video  
11:13 8 display device."

11:13 9 But just to suggest client-side compositing is of itself  
11:13 10 an additional limitation would overlook the fact that what you  
11:13 11 have here in Claim 1 is a specific reference to the compositing  
11:13 12 in accordance with the instructions of the  
11:13 13 compositing-instruction substream.

11:13 14 So in instances where you have specific elements within a  
11:13 15 claim, claim language that calls out something that's  
11:13 16 introduced in a preamble, that further underscores the  
11:13 17 presumption that the preamble's not limiting. And that in this  
11:13 18 case, the phrase in question is directed to a purpose of the  
11:14 19 method because you have specific claim language directed to the  
11:14 20 compositing.

11:14 21 Now, look at what happens instead over at the Claim 7.

11:14 22 So Claim 7 you have -- you generate by video server, you  
11:14 23 multiplex by the video server and you transmit. And what are  
11:14 24 you transmitting by the video server? You're transmitting the  
11:14 25 multiplex data stream to be displayed on the display screen

11:14 1 according to the compositing-instruction substream, but therein  
11:14 2 you're done, right?

11:14 3 All the steps here are recited in the context of the video  
11:14 4 server. When you transmit, that transmission is all that  
11:14 5 Claim 7 requires. It doesn't have, unlike Claim 1, additional  
11:14 6 limitations directed to client-side compositing, right?

11:14 7 So the patentee, when he wanted steps within a body of a  
11:14 8 claim to refer to client-side compositing, they're explicitly  
11:15 9 recited.

11:15 10 Here, to remove all doubt from the -- of the perspective  
11:15 11 of -- the patentee -- sorry. I'm -- it's like I'm redrafting a  
11:15 12 brief in my head as I speak.

11:15 13 But the patentee here on Claim 7 could have just said "the  
11:15 14 method comprising," right? And often that's what you see for  
11:15 15 preamble phrases.

11:15 16 But instead to be -- make it very clear, what should  
11:15 17 already be clear in the language of the claim that each step is  
11:15 18 performed by the video server, what you see here in the  
11:15 19 preamble itself is saying this method is effected by a video  
11:15 20 server.

11:15 21 How do you know that? Because each step also says "by the  
11:15 22 video server."

11:15 23 So when you transmit the multiplex data and, of course,  
11:15 24 perform the preceding steps recited in Claim 7, to suggest then  
11:15 25 and thereafter more is required to infringe Claim 7, we feel

11:15 1 would be a departure from what is recited in Claim 7,  
11:16 2 particularly in view of Claim 1.

11:16 3 And an analysis of these claims side by side is important.  
11:16 4 Courts often do this. They often do this because under the  
11:16 5 Doctrine of Claim Differentiation and other claim construction  
11:16 6 doctrines, the recitations in one claim could be informative as  
11:16 7 to the interpretation in other claims.

11:16 8 We've seen that today. We've seen that when you have  
11:16 9 instances where means-plus-function construction -- or  
11:16 10 limitations are recited in one claim and not another. Other  
11:16 11 claims are recited in Beauregard format. This underscores  
11:16 12 distinctions that are evident in the claim.

11:16 13 So here there could be no question that there's a  
11:16 14 distinction at least in the context of perspective. It's made  
11:16 15 explicit in the preamble.

11:16 16 And we would submit that once the generating multiplexing  
11:16 17 and transmitting is done by the video server, all these are  
11:16 18 intended for the purpose of client-side compositing. But  
11:16 19 that's what happens. The video server transmits this when  
11:16 20 other things -- because of the way things are generated,  
11:17 21 because of the way things are multiplexed, and because of the  
11:17 22 way things are transmitted, this all facilitates client-side  
11:17 23 compositing.

11:17 24 But it doesn't then further require a user to turn on  
11:17 25 their computer or to drink a cup of coffee or to, you know, log

11:17 1 onto the Internet. Like while all those things might happen,  
11:17 2 ultimately what's set forth in the claim is the claim  
11:17 3 requirements.

11:17 4 And we've heard in other briefings and in arguments, oral  
11:17 5 arguments before Your Honor, that the name of the game is the  
11:17 6 claim, and that's true here.

11:17 7 This recites three steps. There's not a fourth step. And  
11:17 8 to suggest Claim 1 recites what would effectively be another  
11:17 9 operative gerund ignores the -- that the call-out within the  
11:17 10 claim language itself, that the compositing-instruction  
11:17 11 substream is what provides the instructions for the compositing  
11:17 12 when it says according to the compositing-instruction  
11:18 13 substream.

11:18 14 I wanted to make certain that these points from our  
11:18 15 briefing were clear. And I'm happy to address any questions  
11:18 16 Your Honor has.

11:18 17 But, again, our focus in our briefing was on a comparative  
11:18 18 analysis between Claims 1 and 7 and an emphasis on what the  
11:18 19 claim language itself says these steps are effected by.

11:18 20 And I'll stop sharing.

11:18 21 MR. LANIER: Your Honor, Sanjiv Laud will respond for  
11:18 22 Google. Thank you.

11:18 23 MR. LAUD: Good morning, Your Honor.

11:18 24 Could we start with Slide 15, please?

11:18 25 Your Honor, I just want to start by noting that the fact

11:19 1 that the server claims in this patent -- and Claim 7 isn't the  
11:19 2 only one -- recite client-side compositing is evidence of how  
11:19 3 important client-side compositing is to the invention here. It  
11:19 4 appears in every preamble of every claim of the patent.

11:19 5 I think what you heard today from Mr. Mangrum is that the  
11:19 6 plaintiff believes there's an inconsistency behind applying the  
11:19 7 requirement of client-side compositing to the server-side  
11:19 8 claim. And I want to demonstrate to you how that's not  
11:19 9 inconsistent.

11:19 10 Let's go to Slide 16 for the moment.

11:19 11 This is from the specification of the patent, Your Honor.  
11:19 12 It's Figure 1 showing the system having a video server and a  
11:19 13 video display device. You can think of this as DirecTV and  
11:19 14 YourTV, for example.

11:19 15 The specification explains that instead of compositing all  
11:19 16 the data streams at the video server as was done in the prior  
11:20 17 art as described in the first column of the patent, the video  
11:20 18 display device composites and displays at least one of the  
11:20 19 media streams.

11:20 20 So you have these two components operating in tandem. You  
11:20 21 have your video server, which is wrapping up and bundling all  
11:20 22 of the media streams as well as a descriptor substream that  
11:20 23 tells you what's in there and the compositing-instruction  
11:20 24 substream that is the fundamental essence of the invention.

11:20 25 And then on the other side you have the video display

11:20 1 device which receives all of that and, unlike the prior art,  
11:20 2 composites the video at the video display device.

11:20 3 Let's go back to the previous slide so we can look at the  
11:20 4 claim language.

11:20 5 There is nothing inconsistent with applying the limiting  
11:20 6 phrase from the preamble "client side compositing of media  
11:21 7 streams" with the rest of this claim. This claim is directed  
11:21 8 to the functions that are shown in that Figure I just showed  
11:21 9 you and described in much more detail in the specification.

11:21 10 It's generating the compositing-instruction substream.  
11:21 11 It's multiplexing that with the descriptor substream and the  
11:21 12 media substreams. And then it's transmitting that to the  
11:21 13 client device to be displayed on the display screen.

11:21 14 There's nothing inconsistent about the server performing  
11:21 15 the intended functions in this system, preparing them to be  
11:21 16 composited on the client side.

11:21 17 And I want to be clear about how we understand that. I  
11:21 18 think Mr. Mangrum is saying we are trying to import an  
11:21 19 additional method step into this claim. I don't think that's  
11:21 20 the right way to understand it.

11:21 21 What we're saying, Your Honor, is that the compositing  
11:21 22 can't happen at the server side because it must be client-side  
11:21 23 compositing. That's the whole purpose of the invention. That  
11:22 24 is the invention of this patent, as I think we made clear in  
11:22 25 our briefs.



11:22 1 So I don't believe there's any inconsistency in saying  
11:22 2 that the last limitation here "transmitting by the video server  
11:22 3 the multiplex data stream to be displayed on the display  
11:22 4 screen" means that that is to be composited and displayed on  
11:22 5 the display screen by the client-side device. That's how we  
11:22 6 understand the claim.

11:22 7 We don't dispute that a server could in theory infringe  
11:22 8 this claim without need of a step being performed on a  
11:22 9 client-side device. We're not trying to make that type of  
11:22 10 divided infringement argument, or that there has to be control  
11:22 11 over both portions of the device. That's not the purpose of  
11:22 12 our argument here, Your Honor.

11:22 13 It's simply to clarify that the whole invention of this  
11:22 14 patent is client-side compositing as opposed to server-side  
11:22 15 compositing. And we believe that fits naturally with Claim 7  
11:22 16 as drafted.

11:22 17 If Your Honor has any other questions, I'm happy to answer  
11:23 18 them. Otherwise, we'll rest on our briefs.

11:23 19 THE COURT: That was very well done.

11:23 20 Mr. Mangrum?

11:23 21 MR. MANGRUM: Yes. Thank you, Your Honor.

11:23 22 Just a couple of points. Our position is not then that  
11:23 23 their interpretation is inconsistent. It has been that the  
11:23 24 transmitting step -- let me share, again, so we can walk  
11:23 25 through the claim language one last time.

11:23 1 Okay. This transmitting step is the last step. You just  
11:23 2 heard that from opposing counsel, and we agree. When the  
11:23 3 server transmits -- this is the video server -- when it  
11:23 4 transmits the multiplex data stream to be displayed at some  
11:23 5 future time, I believe opposing counsel just used the words "to  
11:23 6 prepare for compositing." We agree that's the last step.

11:23 7 Once the transmitting occurs, what is required -- and  
11:23 8 provided the generating and multiplexing has occurred, once  
11:24 9 the -- what opposing counsel referred to as the transmitting,  
11:24 10 the last step, once that occurs, that's all that was required.

11:24 11 And so it's not a question of whether or not is it  
11:24 12 consistent if the client side does compositing. It's whether  
11:24 13 you have to further add, in addition to the transmitting, a  
11:24 14 compositing by the video display device the transmitted  
11:24 15 multiplex data stream. That's effectively what they're asking  
11:24 16 to Court to do.

11:24 17 And we submit -- and you just heard from the other side  
11:24 18 that transmitting's the last step.

11:24 19 Once the video server transmits, there need not be a  
11:24 20 separate and additional compositing step. And we know that  
11:24 21 partially because of the way when the tables are flipped --  
11:24 22 sorry. I said tables. What I mean is perspective.

11:24 23 When the perspective switches to the video display device,  
11:24 24 you're not preparing to display, right? You are displaying  
11:25 25 based off what had been transmitted.

11:25 1 So Claim 1 is a little bit different in that because of  
11:25 2 its unique perspective, it talks about what happens after the  
11:25 3 transmission occurs, and that includes discussion of the  
11:25 4 compositing data stream.

11:25 5 So the fact that all of these claims reference this  
11:25 6 overarching purpose does not mean that then becomes a claim  
11:25 7 limitation. When the compositing at the video display device  
11:25 8 is a claim limitation, it's called out.

11:25 9 When in Claim 7 the transmitting being the last step is  
11:25 10 executed, that's all that's required.

11:25 11 And so our construction has simply been: Follow the claim  
11:25 12 language and nothing extraneous to the claim language is  
11:25 13 required.

11:25 14 MR. LAUD: If I may, Your Honor, just a brief response.

11:25 15 THE COURT: Of course.

11:26 16 MR. LAUD: On Claim 7 let me just note, I think there's a  
11:26 17 little confusion. At least I'm confused as to what the  
11:26 18 plaintiff is arguing. It seems they're either arguing that the  
11:26 19 claim doesn't require any compositing at all, which doesn't  
11:26 20 make sense with the invention, or they're saying that  
11:26 21 server-side compositing is encompassed by the claim language  
11:26 22 contradicts the purpose of the invention, and as we said in our  
11:26 23 briefs, just about everything in the patent.

11:26 24 So I'm not sure which of those it is, but I don't think it  
11:26 25 matters because --

11:26 1 Could we look at Slide 10?

11:26 2 -- you don't look at the claim language in isolation. We  
11:26 3 cited a case in our responsive brief. It's Corning Glassworks,  
11:26 4 Page 32 of our response brief.

11:26 5 The Federal Circuit has told us whether a claim preamble  
11:26 6 is limiting can only be resolved on review of the entire patent  
11:26 7 to understand what the inventors actually invented and intended  
11:26 8 to encompass by the claims.

11:26 9 And we think in this case it's very clear what we would  
11:27 10 call the Poly-America test is satisfied here. This case is on  
11:27 11 all fours with the Federal Circuit's decision in Poly-America.

11:27 12 The specification of this patent is replete with  
11:27 13 references to client-side compositing. It is the title of the  
11:27 14 invention. It's the first sentence of the abstract. It's the  
11:27 15 summary of every embodiment. There is no embodiment that does  
11:27 16 not involve client-side compositing. It's repeated in every  
11:27 17 claim.

11:27 18 It's clear from all of that the inventors considered this  
11:27 19 to be important, and beyond important, a fundamental  
11:27 20 characteristic of the invention. It's not just an intended use  
11:27 21 or purpose. It is the invention, and, therefore, it's properly  
11:27 22 construed as a limitation of the claim itself.

11:27 23 With that, Your Honor, nothing further from Google. Thank  
11:27 24 you.

11:27 25 THE COURT: Mr. Mangrum?

11:27 1 MR. MANGRUM: Yeah. I don't know if Your Honor shares the  
11:27 2 same confusion, but I want to at least address the point that  
11:27 3 was raised if that would be helpful. And it is that it's  
11:27 4 not -- we're not making the argument that you have to do  
11:28 5 server-side compositing under Claim 7. That's not the  
11:28 6 position.

11:28 7 The position is that the claim does not have any explicit  
11:28 8 requirements post-transmission, right? And I think we heard a  
11:28 9 concession on that point today. So you can't do client-side  
11:28 10 compositing prior to transmitting, and transmitting is the last  
11:28 11 step.

11:28 12 Now, these types of steps operating in cooperation with  
11:28 13 each other, the generating, multiplexing and transmitting are  
11:28 14 all set up to facilitate what is expressed as a purpose in the  
11:28 15 preamble, and that occurs thereafter. And I think that point's  
11:28 16 now uncontested.

11:28 17 But to suggest Claim 7 further requires, in addition to  
11:28 18 these three steps, compositing does not comport with the claim  
11:28 19 language.

11:28 20 We would also submit, Your Honor, that there is a lot of  
11:28 21 authority -- and I'm sure Your Honor's aware of it -- where  
11:29 22 there's no legally recognizable reducing something down as an  
11:29 23 essential element or a gist or heart of the invention. And one  
11:29 24 example is the Allen case. That's 299 F.3d 1336.

11:29 25 And also let me give you another citation, Ormco Corp.,

11:29 1 498 F.3d 1307. And there the Federal Circuit said, "This Court  
11:29 2 has rejected a claim construction process based on the essence  
11:29 3 of an invention." And so -- and that was a 2007 case.

11:29 4 So to suggest, okay, transmitting's the last step, but we  
11:29 5 want all the claims to further require an additional and  
11:29 6 unrecited step because client-side compositing somehow is the  
11:29 7 essence or gist of the invention.

11:29 8 It is already, I think, defeated by the concession that  
11:29 9 transmitting is the last step but also is inconsistent with  
11:29 10 authority that says you don't add claim limitations that aren't  
11:30 11 recited ostensibly because those are necessary or the gist or  
11:30 12 the heart of the invention.

11:30 13 Claim language controls for Claim 7. There's no  
11:30 14 compositing. For Claim 1 there is in the displaying step. And  
11:30 15 so to suggest we should add and import limitations from a  
11:30 16 non-limiting aspect of the preamble we submit is not consistent  
11:30 17 with the plain and ordinary meaning.

11:30 18 MR. LAUD: Your Honor, I think the argument amounts to  
11:30 19 don't believe your lying eyes. The --

11:30 20 THE COURT: Can you all give me just one second?

11:30 21 MR. LAUD: Of course.

11:30 22 (Pause in proceedings.)

11:30 23 THE COURT: Okay. Thank you, sir.

11:30 24 You can continue, please.

11:30 25 MR. LAUD: Thank you.

11:31 1 The Federal Circuit has made clear that the essence of the  
11:31 2 invention is important. In fact, that's pretty much one of the  
11:31 3 most important aspects of the patent for determining whether a  
11:31 4 preamble's limiting.

11:31 5 I would point Your Honor to the Vizio case that we cited  
11:31 6 in our briefs. That's 605 F.3d 1330 at 1341, where the Federal  
11:31 7 Circuit concluded on very similar technology that decoding in  
11:31 8 an MPEG-2 transport stream was the essence or a fundamental  
11:31 9 characteristic of the claimed invention, and, therefore, even  
11:31 10 though it was a preamble, it was a limitation of the claims.

11:31 11 Thank you.

11:31 12 THE COURT: You're welcome. Thank you.

11:31 13 I'll be back with you all in a few seconds.

11:31 14 (Pause in proceedings.)

11:32 15 THE COURT: If we could go back on the record, please.

11:32 16 The Court is going to maintain its preliminary  
11:32 17 construction that the claim term is limiting.

11:32 18 A couple of things to take up: One, we will get out a  
11:32 19 resolution in the next day or so of the one claim term I've  
11:32 20 left up in the air. And we'll get that done very quickly.

11:32 21 I'll just pick on Mr. Mangrum because I can see your face  
11:32 22 right in front of me.

11:32 23 Do we have a trial date set in this case yet?

11:32 24 MR. MANGRUM: Yes. We do, Your Honor.

11:32 25 THE COURT: And how many patents do we have set in this

11:32 1 case?

11:32 2 MR. MANGRUM: Let me confirm.

11:33 3 15, Your Honor.

11:33 4 THE COURT: So here's what I would like you all to do.

11:33 5 Mr. Lanier, I'll put you in charge, but of course -- hold  
11:33 6 on one second.

11:33 7 Okay. Apparently the first trial is set for March, a  
11:33 8 year. I'd like for you all to get together. I picked on  
11:33 9 Mr. Lanier, but of course you all can self-assign.

11:33 10 But we're not going to do 15 patents in a case -- I'm  
11:33 11 sorry -- in a trial. We probably won't do them maybe even in  
11:33 12 two trials, even though I guess patents could fall away as we  
11:33 13 go through, you know, the course of everything.

11:33 14 What I would like for you all to do is -- now, let me  
11:33 15 start over.

11:33 16 Mr. Lanier, you and Mr. Mangrum and others, you're all big  
11:33 17 boys. If you'd say we could do 15 patents in a trial, then,  
11:33 18 you know, I'll set aside enough time to do it. But my guess is  
11:34 19 that's probably not what Google would want. And so -- it's not  
11:34 20 what I would want if I were Google, so I'm just presuming that.  
11:34 21 So I'm not sure it's -- I'm not sure it's what the plaintiff  
11:34 22 wants either.

11:34 23 So if you all can get together and figure out what  
11:34 24 grouping of patents -- probably if there are -- if there are  
11:34 25 more than ten patents, we may need three trials even though



11:34 1 I'll be -- you know, we'll be stacking up trials at that time.  
11:34 2 But for sure we can get one done.

11:34 3 I feel relatively comfortable we can do between four and  
11:34 4 six patents in a trial if -- hopefully there may be a grouping  
11:34 5 of technology. There may be a grouping of accused products,  
11:34 6 something that tethers them together. I'll let you all take  
11:34 7 the first crack in telling me what group you think makes sense  
11:35 8 to go to trial first.

11:35 9 Probably what we'll do -- what we've done so far in the  
11:35 10 Intel case, and it's worked -- I think it's worked well. Maybe  
11:35 11 there would be disagreement among the lawyers. But what we did  
11:35 12 was we kept the timing of everything, for example, all 15  
11:35 13 patents the same as though they were all going to trial on that  
11:35 14 March date. But we knew going in that they weren't all going  
11:35 15 to be tried. And that's worked pretty well because, you know,  
11:35 16 we've had seriatim pretrial conferences now and done other  
11:35 17 things.

11:35 18 And, obviously, now that I know more about what's going on  
11:35 19 in that case, it's helping me -- we had a pretrial hearing  
11:35 20 yesterday that was much easier because I've been through this  
11:35 21 once. We've all been through it once.

11:35 22 So we will keep everything -- for scheduling discovery  
11:36 23 expert reports, everything like that, we will keep the trial  
11:36 24 date as though it's all 15 patents. But I'm telling you I'm  
11:36 25 not going to try 15 patents, and I would like for you all to

11:36 1 come up with a number that's between, say, four and five, six,  
11:36 2 seven, something like that that you all -- both sides feel will  
11:36 3 be comfortable we could try.

11:36 4 And I will give you an appropriate amount of time for  
11:36 5 whatever number of patents we're trying. I think we had -- we  
11:36 6 had a disagreement in trial.

11:36 7 We had 14 or 15 hours in the last trial I had. And the  
11:36 8 reason I say that is because they didn't use up all the time.  
11:36 9 So I don't know how much time I actually -- I can't remember.

11:36 10 But I can assure both sides I will give you adequate time  
11:36 11 to try your case, depending on the number of patents you tell  
11:36 12 me that we're going to be trying in that case.

11:36 13 I will set a number of hours based on the number of  
11:36 14 experts you tell me you're going to have, witnesses you tell me  
11:37 15 you're going to have. And I'll make sure that the plaintiff  
11:37 16 has an adequate amount of time to try their case and put on a  
11:37 17 short rebuttal case and that Google has an opportunity to  
11:37 18 defend its case and put on its case-in-chief. So I will  
11:37 19 guarantee you that.

11:37 20 So even though I'm continuing to believe -- and I'll give  
11:37 21 you this, my only lecture from the bench, time -- a shorter  
11:37 22 amount of time. None of you believe me. I wouldn't believe me  
11:37 23 when I was on your side of the bench. Less time is better for  
11:37 24 everyone. It makes things -- it makes the jury happy, and it  
11:37 25 makes you all less repetitive.

11:37 1 But I want everyone on this -- I want everyone to feel  
11:37 2 like they had an adequate amount of time to present their case.  
11:37 3 And so I will do my very best to give you the amount of time  
11:37 4 that I can, given my schedule, to give you all -- allow you to  
11:37 5 try the case with as many hours as possible.

11:38 6 Is there anything -- I'll start with plaintiff's counsel.  
11:38 7 Is there anything we need to take up?

11:38 8 MR. MANGRUM: This is Brett Mangrum for plaintiff. And  
11:38 9 not at this time, Your Honor. Thank you for your time.

11:38 10 THE COURT: Mr. Lanier?

11:38 11 MR. LANIER: Your Honor, thank you for that. Thank you  
11:38 12 for that guidance. Only -- we agree with the approach Your  
11:38 13 Honor's outlined. That makes good sense to us. We'll work  
11:38 14 with Mr. Mangrum and team to come to a proposal.

11:38 15 My only question -- and it's guessing, I understand, that  
11:38 16 is. Does Your Honor have a sense if we were to, say, have  
11:38 17 three trials, are they going to be back to back to back or  
11:38 18 staged out by a month --

11:38 19 THE COURT: No. I can tell without any equivocation, they  
11:38 20 will not be back to back. I don't think it's -- number one,  
11:38 21 it's not fair to you guys. It's not fair to your clients, and  
11:38 22 it's not fair to you all.

11:38 23 Number two, when I -- by March of 2022, we have plenty to  
11:38 24 do already in March. We have plenty to do already in April.  
11:39 25 And I -- what I will tell you all, I'm going to try and figure

11:39 1 out as I learn what I'm doing, I guess our trial in the first  
11:39 2 Intel case -- gosh, I lost track. The next one's in April.

11:39 3 If I feel like I did not give them enough time between  
11:39 4 trials to get ready, then I will probably spread the -- you  
11:39 5 know, by a month or so -- I think I gave two or three months  
11:39 6 between. In this case, given the number of patents there are,  
11:39 7 I might make sure there was like, say, at least two or three  
11:39 8 months, you know, between the trials to make sure that you all  
11:39 9 had adequate time to get ready for the next trial and do other  
11:39 10 things in your life that you have to do professionally and all  
11:39 11 that.

11:39 12 So I will be very -- I will have much -- they will not be  
11:39 13 back to back. I will have much more real-world experience  
11:39 14 next -- when we're setting them next -- you know, when I start  
11:40 15 setting them to have an idea of what's the fairest thing to you  
11:40 16 all to do. And so...

11:40 17 MR. LANIER: Your Honor, thank you for that. We  
11:40 18 appreciate that really clear guidance. That helps us plan.

11:40 19 I join Mr. Mangrum in thanking Your Honor for the time and  
11:40 20 leave you only with the testimony that my team will tell you  
11:40 21 that I am a fervent believer in time limits and page limits,  
11:40 22 and we will make it work.

11:40 23 So thank you, Your Honor.

11:40 24 THE COURT: Well, time limits are -- I just cannot tell  
11:40 25 you how much better off you are by limiting what you're doing.

11:40 1 It's putting -- even if I didn't give you time limits, I would  
11:40 2 tell you all to impose self-time-limits. It's so much better  
11:40 3 for the jurors.

11:40 4 But you all continue to say almost every hearing --  
11:40 5 Mr. Jones can tell me if I'm lying because I think he's been on  
11:40 6 dozens of these hearings now -- I try and say this at every  
11:40 7 hearing. The reason when the press continues to question why I  
11:41 8 handle so many patent cases, I don't think anyone enjoys  
11:41 9 handling them more than I do.

11:41 10 I know Mr. Jones would say there are judges in the Eastern  
11:41 11 District who enjoy them as much and are certainly probably  
11:41 12 better at handling than I am. But the lawyers, every time I  
11:41 13 have a hearing, are exceptional. It's a real credit to your  
11:41 14 clients, the quality of lawyers I get in every single case.  
11:41 15 This was no exception. It's the very best lawyers.

11:41 16 And every hearing I have, I have to prepare very hard for  
11:41 17 because it's like a final exam over and over with the very best  
11:41 18 lawyers in America and all across America.

11:41 19 You know, I don't think any federal judges, other than,  
11:41 20 again, some in the Eastern District and maybe in Delaware, have  
11:41 21 the breadth of national lawyers that I do in my court on a --  
11:41 22 you know, on an every-hearing basis. And I take great pride in  
11:42 23 that and what we've done in the court. And so this was another  
11:42 24 example of why I have the best job in the world.

11:42 25 So you all have a -- it's not Friday, is it? It's

11:42 1 Thursday.

11:42 2 Despite that, it's been a long week. I've had a lot of  
11:42 3 Markmans and other hearings already.

11:42 4 You all have a wonderful rest of the week. Have a great  
11:42 5 weekend. I look forward to seeing you hopefully in person in  
11:42 6 the very near future. Take care.

7 (Hearing adjourned at 11:42.)

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1 UNITED STATES DISTRICT COURT )  
2 WESTERN DISTRICT OF TEXAS )  
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